

PROCEEDINGS

IN THE

EQUITY SUIT

OF THE

Commonwealth of Virginia

VS.

The State of West Virginia,

WITH AN APPENDIX.

COMPILED BY

CLARKE W. MAY, Attorney General.



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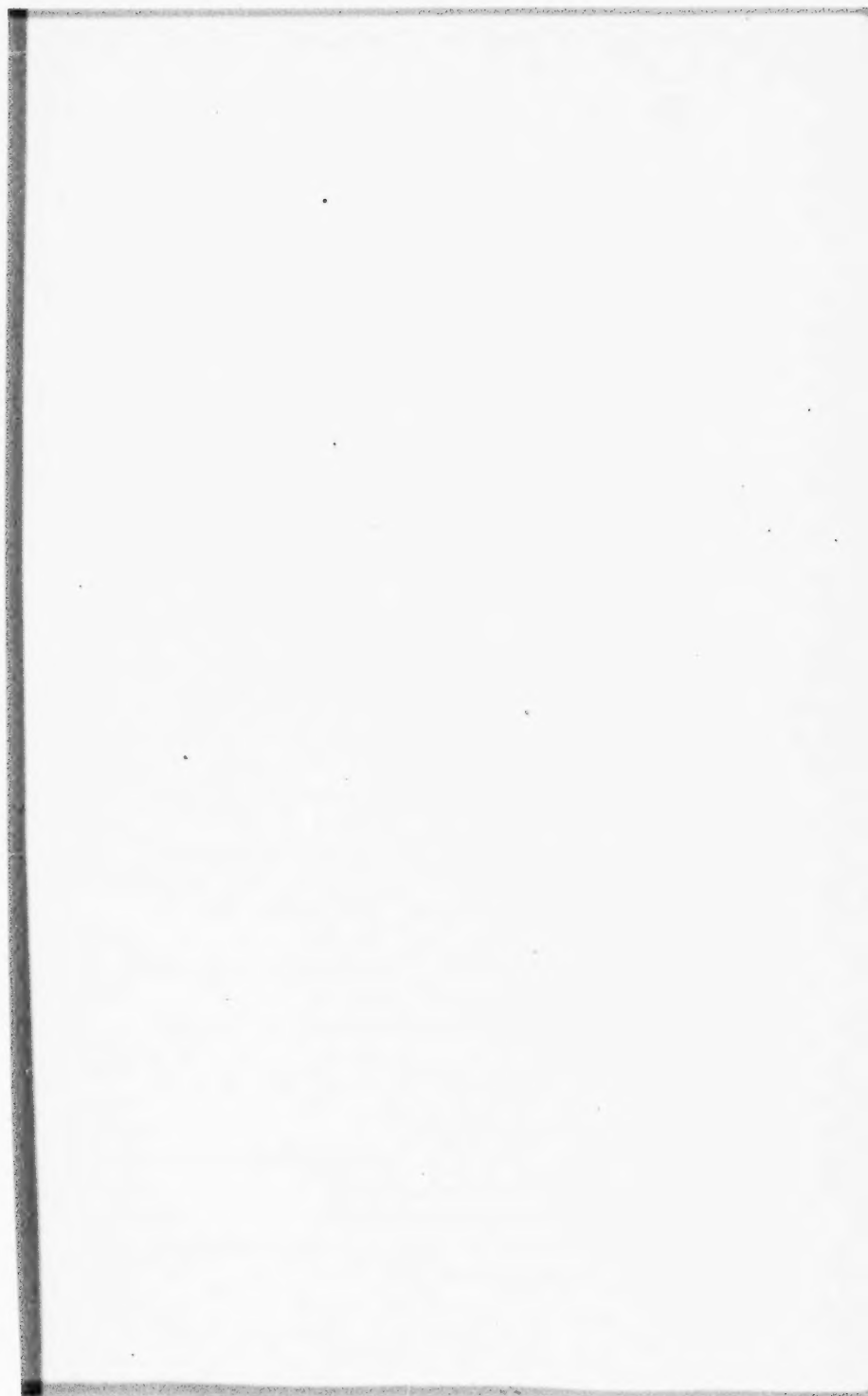


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INTRODUCTORY.

In this volume will be found the proceedings in full to this time in the suit of the Commonwealth of Virginia vs. West Virginia, in the Supreme Court of the United States. There have been from time to time many requests made to me, to Governor Dawson and the other members of the Board of Public Works, from citizens of the State, for information as to the progress of this suit, and what is being done to protect the State's interests therein. And knowing of no better way by which the public could be informed of the true situation, I have prepared this volume and in it will be found all that has been done by either party to said suit to the present time.

For the further information of those interested, there is added as an appendix some sections of the ordinance of August 20, 1861, passed by the Wheeling Convention, relating to the public debt of Virginia, some sections of the first Constitution of West Virginia, the act of the General Assembly of Virginia giving the consent of that State for the formation of West Virginia, the act of Congress admitting West Virginia into the Union, resolutions of the West Virginia Legislature concerning the Virginia Debt and the report of the Commissioners appointed by the Governor of West Virginia pursuant to a resolution of its Legislature and the report of the Senate Finance Committee of 1873.

The Legislature, at its recent session, chapter 45, Acts 1907, passed an act directing the Attorney General to defend the State in this cause and authorized the Board of Public Works to employ such attorneys and agents to assist the Attorney General in such defense as in its judgment shall be necessary for the purpose; and in pursuance of this act, the Board has employed Hon. John G. Carlisle, late Speaker of the House of Representatives and Secretary of the Treasury, the law firm of Mollohan, McClintic and Mathews, of Charleston, and Hon. Charles Edgar Hogg, of Morgantown.

By reference to the opinion of the Court overruling the demurrer of the State of West Virginia, it will be noticed therein that nothing has been decided definitely against the State, as the Court in overruling the demurrer says that it is done without prejudice to any question raised in the demurrer being raised in the answer, which it

INTRODUCTORY.

provides shall be filed by the first Monday of the next term, which term begins in October next.

The further proceedings in this case will be given in this manner from time to time, as they develop.

With the assurance that everything is being done by the Attorney General and the counsel employed to assist him in this behalf that can be done to protect the interests of the State, and that the Board of Public Works is heartily co-operating with the counsel, and that they together are giving to the case every attention that it requires, I beg leave to subscribe myself,

Very respectfully,

CLARKE W. MAY,
Attorney General.

IN THE SUPREME COURT OF THE UNITED STATES.

ORIGINAL, No. 7.

COMMONWEALTH OF VIRGINIA,

vs.

STATE OF WEST VIRGINIA.

1 To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Commonwealth of Virginia, by William A. Anderson, her attorney-general, brings this, her bill, against the State of West Virginia, and shows to the Court that:

I.

On the first day of January, 1861, your Oratrix was indebted in about the sum of \$33,000,000.00 upon obligations and contracts made in connection with the construction of works of internal improvement throughout her then territory. By far the greater part of this indebtedness was shown by her bonds and other evidences of debt, given for the large sums of money which she from time to time had borrowed and used for the above purpose but a portion of her liabilities though arising under contracts made before that date, had not then been covered by bonds issued for their payment.

In addition to the above liability to the general public, there was a large indebtedness evidenced by her bonds and other liabilities held by and due to the Commissioners of the Sinking Fund and the Literary Fund of the State, as created under her laws amounting, the former to \$1,462,993.00, and the latter to \$1,543,669.05 as of the same date.

The official reports and records showing the exact character and amounts of the public debt thus contracted and how the same was created, are referred to, and will be produced upon a hearing of the case.

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II.

That portion of the territory embraced in what constitutes the present territorial limits of Virginia was prior to that date devoted mainly to agriculture, and to some extent to grazing and manu-

facturing, which afforded its chief sources of revenue, while that portion included in what now constitutes the State of West Virginia had vast potentialities of wealth and revenue in the undeveloped stores of minerals and timber, which had been known for many years prior to the date named, and their prospective values, if made accessible to the markets of the country, were understood to be well nigh beyond computation. It was to hasten and facilitate the development of these sources of wealth and revenue by the construction of graded roads, bridges, canals and railways, extending through the State from tidewater towards the Ohio river, that the Commonwealth of Virginia, in the first quarter of the Nineteenth century, entered upon a system of public internal improvements, which it was contemplated should include the entire territory of the State, and embraced in its design the construction of public works adapted, not to the needs of any one portion of the State alone, but of the entire State, as a unit of interest. The larger part of these works were constructed East of the Appalachian range, as leading up to the undeveloped territory West thereof, but a very considerable portion of them were, at an expense of several millions of dollars, constructed West of said range within the territory now included in the State of West Virginia; and the completion of some of the main lines of improvement beyond the said range and through to the Ohio river, since the first day of

January, 1861, has increased to a very great and material extent the values of real estate, including coal and timber, in the said territory now included in West Virginia, thus carrying into effect the original scheme of improvement, which could not have been done had not the lines East of said range been first constructed; and your Oratrix believes and avers that the property values within the limits of West Virginia have been enormously enhanced in a large measure by reason of these improvements. The money appropriated to the payment of the annually accruing interest on the said debt, prior to January 1st, 1861, and to the formation of the Sinking Fund for the ultimate redemption thereof, was derived from taxes imposed upon the property subject to taxation throughout the entire State. The first of this indebtedness to be contracted was a small amount borrowed by the State in the year 1820 and the debt was thereafter from time to time continued and increased by renewals and new loans until it reached the amount above stated in 1861.

III.

The Commonwealth of Virginia was induced to enter upon the construction of this general system of internal improvement, in a very large measure for the purpose of developing the aforesaid resources of the Western portion of the State now constituting the State of West Virginia, thereby ameliorating the condition of her citizens residing therein; and it was with this view that she took upon herself the burden of the public debt for which her bonds were

issued, without which debt such improvements could not have been undertaken. In corroboration of this view it will appear
4 from an inspection of the legislative records of the State, where the vote carrying the appropriations for such public improvements was recorded, that in nearly every instance a majority of those members of the House and Senate of the original State, who then represented the counties now composing West Virginia, voted for such appropriations. Indeed it appears from those records that a great majority of the Acts of the legislature of Virginia under which said indebtedness was created, would have failed of their passage, had the representatives from the counties embraced in what is now West Virginia opposed their enactment, and that a very large proportion of said indebtedness was actually contracted over the votes of a majority of the representatives from the counties and cities embraced in the limits of the present State of Virginia. This will be found to be true, not only in the legislature for one single session, but in the legislatures for many successive years, thus showing it to have been the fixed policy of the people in that portion of the State now constituting West Virginia to participate in, support and carry out this general plan of internal improvements in the State.

IV.

The development of this system of public improvements thus entered upon was, from its character and extent, necessarily progressive, and the same extended with the general growth and increasing needs of the State, and was incomplete, as above stated, in 1861, though a very considerable portion of such improvements had, prior to that time, been constructed as above stated, in the territory now constituting West Virginia, in order to meet the needs of the people of that portion of the State for their local
5 purposes. As early as the year 1816 a Board of Public Works was created by law for the State, the members of which were elected by the voters of the State at large, and this Board had in charge the construction and supervision of all the works of public improvement in this State. The annual reports of this Board will be referred to for information as to the character, extent, cost and location of the public works and internal improvements constructed in the State prior to January 1st, 1861. The amounts expended upon the construction of these works in what is now West Virginia can only be accurately ascertained by an examination of the numerous entries in the records of this Board extending through a number of years and showing such expenditures as made from time to time.

V.

On the 17th of April, 1861, the people of Virginia, in general convention assembled, adopted an ordinance by which it was in-

tended to withdraw Virginia from the Union of the States. From this action a considerable portion of the people of Virginia dissented, and organized a separate government which was known and recognized by the government of the United States as the "Restored State of Virginia," and will be hereafter referred to in this bill as the "Restored State."

VI.

On the 20th day of August, 1861, the Restored State of Virginia, in convention assembled, in the city of Wheeling, Virginia, adopted an ordinance to "provide for the formation of a new State out of the portion of the territory of this State;" Section 9 of which ordinance was as follows, to-wit:

6 "9. The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, 1861, to be ascertained by charging to it all the state expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government since any part of said debt was contracted, and deducting therefrom the moneys paid into the Treasury of the Commonwealth from the counties included within the said new State during said period. All private rights and interests in lands within the proposed State, derived from the laws of Virginia prior to such separation shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in the State of Virginia.

VII.

On the 31st day of December, 1862, an Act was passed by the 37th Congress of the United States providing that the new State thus formed in pursuance of the ordinances of the Wheeling convention above referred to, should upon certain conditions, be admitted into the Union by the name of West Virginia, with a constitution which had theretofore been adopted for the new State by the people thereof, such conditions being that a change should be made in such proposed constitution in regard to the liberation of slaves therein and it was provided by this Act of Congress that
7 whenever the President of the United States should issue his proclamation stating the fact that such change had been made and ratified, thereupon the Act admitting the new State into the Union should take effect sixty days after the date of such proclamation. Such proclamation declaring these conditions to have been complied with was duly made by President Lincoln on April 20th, 1863, and West Virginia, in conformity therewith and by the operation of said Act of Congress, was admitted into the Union as a State on the 20th day of June, 1863; and thereupon the State of West Virginia became fully organized, and each of its departments of government commenced operation on the date last named.

VIII.

Pending the admission of the State of West Virginia to the Union the General Assembly of the Restored State of Virginia passed February 3, 1863, the following Act:

"That all property, real, personal and mixed, owned by, or appertaining to this state, and being within the boundaries of the proposed State of West Virginia, when the same becomes one of the United States, shall thereupon pass to, and become the property of the State of West Virginia, and without any other assignment, conveyance or transfer or delivery than is herein contained, and shall include among other things not herein specified all lands, buildings, roads, and other internal improvements or parts thereof, situated within said boundaries, and vested in this state, or in the president and directors of the literary fund, or the board of public works thereof, or in any person or persons for the use of this state, to the extent of the interest and estate of this state therein;

and shall also include the interest of this state, or of the
8 said president and directors, or of the said board of public works, in any parent bank or branch doing business within said boundaries and all stocks of any other company or corporation, the principal office or place of business whereof is located within said boundaries, standing in the name of this state, or of the said president or directors, or of the said board of public works, or of any person or persons, for the use of this state.

5. That if the appropriations and transfers of property, stocks, and credits provided for by this act, take effect, the State of West Virginia shall duly account for the same in the settlement hereafter to be made with this state, provided that no such property, stocks and credits shall have been obtained since the reorganization of the state government."

Your oratrix is informed, believes, and so charges, that the property which was by the operation of this Act appropriated and transferred from the State of Virginia to the State of West Virginia, and which was subsequently received and enjoyed by the State of West Virginia, consisted of a number of items, and the value of it amounted in the aggregate, to several millions of dollars, the exact amount your Oratrix is unable at this time more definitely to ascertain and state. That of the bank stocks alone, which were transferred under the operation of this Act, the State of West Virginia realized and received into her Treasury from the sale thereof about Six Hundred Thousand Dollars; and that no
9 part of the property so received by West Virginia had been obtained by Virginia since April, 1861.

IX.

And by a further Act of the General Assembly of the Restored State of Virginia passed on the next day, February 4th, 1863, it was enacted.

"1. That the sum of One Hundred and Fifty Thousand Dollars be, and is hereby appropriated to the State of West Virginia out of moneys not otherwise appropriated, when the same shall have been formed, organized and admitted as one of the States of the United States.

2. That there shall be, and hereby is appropriated to the said State of West Virginia when the same shall become one of the United States, all balances, not otherwise appropriated, that may remain in the treasury, and all moneys not otherwise appropriated, that may come into the treasury up to the time when the said State of West Virginia shall become one of the United States; provided, however, that when the said State of West Virginia shall become one of the United States, it shall be the duty of the auditor of this State, to make a statement of all the moneys that up to that time, have been paid into the treasury from counties located outside of the boundaries of the said State of West Virginia, and also of all moneys that up to the same time, have been expended in such counties, and the unexpended surplus of all such moneys shall remain in the treasury and continue to be the property of this State."

And this last named sum of One Hundred and Fifty Thousand Dollars, together with other sums belonging to the State of Virginia, were turned over to and received or collected by the new State of West Virginia after its formation as aforesaid.

X.

The Constitution of the State of West Virginia, which became operative and was in force when she was admitted into the Union contained the following provisions:

By Section 5 of Article VIII. of said Constitution it was provided:

"5. No debt shall be contracted by this State except to meet casual deficits in the revenue, to redeem a previous liability of the State, to suppress insurrection, repel invasion, or defend the State in time of War."

And by Section 7 of Article VIII. it was provided:

"7. The legislature may, at any time, direct a sale of the stocks owned by the State, in banks and other corporations, but the proceeds of such sale shall be applied to the liquidation of the public debt, and hereafter the State shall not become a stockholder in any bank."

And by section 8 of Article VIII. it was provided:

"8. An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this State, and the legislature shall ascertain the same as soon as may be practicable and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

At the time the Constitution containing these provisions was adopted, West Virginia did not owe, and could not have owed, any "public debt" or "previous liability," except for her just, contributive proportion of the public debt of the original State of Virginia, and for the money and property of the original State which had been transferred to and received by her under the Acts of the General Assembly of the Restored State of Virginia above set forth. By the provisions of Section 8 of Article VIII., above cited, she expressly assumed her equitable proportion of the debt of the original State as it existed prior to the first day of January, 1861. By section 5 of the same Article VIII., above set forth, her Constitution forbade the creation of any debt "except to meet casual deficits in the revenue, to redeem a previous liability of the State," &c., and there was not and could not have been any such "previous liability," except her portion of the debt of the original State, and her liability for the money and property of the original State which had been transferred to and received by her under the Acts of the General Assembly of the Restored State. And Section 7 of the same Article of her Constitution, above cited, authorized a sale of the stocks owned by the State, in banks and other corporations, the proceeds to be applied to the liquidation of the public debt; and she had no such stocks, except those acquired, as above stated, from the original State. This section of her constitution also expressly required the proceeds of such sale to be applied to her public debt, which public debt could only have

12 been her proportion of that of the original State of Virginia, and her liability for the money and property of the original State which had been transferred to her.

XI.

After the year 1865 and prior to the year 1872 attempts were made at different times by the public authorities of both the Commonwealth of Virginia and the State of West Virginia, respectively, to ascertain their contributive proportions of the common liability resting upon them for the public debt of Virginia, contracted prior to January 1st, 1861; but all such attempts proved ineffectual and vain, and no accounting or settling of any kind was ever had between the two States in regard to this debt.

XII.

The efforts looking to a settlement by the concurrent action of the two States having proved abortive, and your Oratrix being anxious to adjust the portion of the common debt which it was right that she should assume and pay, upon terms just and equitable alike to the public creditors and to West Virginia, made several efforts to effect such a settlement.

The first of these was made by the General Assembly which was chosen at the close of the period of "destruction and recon-

struction," which, following closely upon the period of disastrous war, had inflicted upon her people injuries and losses, the harmful effects of which were then by no means realized.

The purpose of the representatives of the Commonwealth, then just emerging from conditions which had impoverished her people and paralyzed their productive energies, to assume and pay 13 to the uttermost every dollar which her most exacting creditor could demand of her, was expressed in the Act of her General Assembly, approved March 30, 1871.

By the terms of settlement embodied in this Act, your Oratrix undertook to give her obligations bearing 6% interest for two-thirds of the principal, and for two-thirds of the past due interest, and also for two-thirds of the interest on that accrued interest, which accrued interest to the extent of nearly \$8,000,000, had been funded after the War in new bonds of Virginia, thus capitalizing at 6% not only the interest, but interest upon that interest.

It was soon apparent that Virginia had by this measure assumed a heavier burden than she was able to bear, and so other plans for the settlement of the State debt were attempted by the Acts of the General Assembly of the Commonwealth approved March 28, 1879, and February 14, 1882, until at length a final and satisfactory settlement of the portion of the debt of the original State which Virginia should assume and pay was definitely concluded by the Act of February 20, 1892. Your Oratrix will file copies of each of the Acts of her General Assembly herein mentioned as exhibits to this bill, and to be read as part hereof.

XIII.

As farther indicating the great burden which your Oratrix, notwithstanding the disaster and loss above referred to, has assumed and met on account of the common debt of the undivided State, she shows your Honors that, since, January 1st, 1861, she has actually paid off, retired and discharged, or assumed and given her new outstanding obligations for the aggregate sum of over 14 Seventy One Million Dollars, as will more particularly appear from a statement thereof filed as an exhibit herewith and hereinafter referred to as Exhibit Number 7.

It is proper in this connection to call attention to the fact that, while your Oratrix has made this large contribution towards the settlement of the common debt, West Virginia has not paid one dollar thereof; and although in the early years of her history she repeatedly conceded that there was some portion of that debt which should equitably be borne by her, her properly constituted authorities have for a number of years refused to recognize that any liability whatever rested upon her, on that account, and have declined even to enter into an accounting or to treat with your Oratrix in reference thereto.

It would seem from the above statement that Virginia has already done as much under all the circumstances as she could be

fairly expected to do towards paying off the common public debt of the old State. Such was the view and purpose of the General Assembly in the several Acts above recited.

A question may be raised as to whether such was the effect of the language used in the Act of March 30, 1871, with respect to the certificates issued thereunder; but the great mass of the creditors entitled to whatever may be due upon the unfunded obligations of the undivided State, have in effect agreed, as will be hereinafter shown, to waive any such question, and to accept the adjudication of this Court in this cause against West Virginia in full discharge of all their claims, thus giving that effect to the Act of March 30, 1871, which it was the purpose of your Oratrix that it should have.

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XIV.

By each of the Acts for the settlement of her debt above recited, it was provided that the bonds of undivided Virginia so far as not funded in the new obligations given by your Oratrix, should be surrendered to and held by your Oratrix, who either by the express terms of the settlement provided for by said Acts, or as a just and equitable consequence therefrom, received and holds said original bonds so far as unfunded, in trust for the creditor who deposited the same with her, or his assigns; and certificates to this effect were given by your Oratrix to each creditor whose old Virginia bond was so surrendered to her.

Having as an essential part of the contract for the adjustment of the common debt of the original State entered into this fiduciary relation in reference to these bonds, it became her obligation of duty to the creditors who had confided their securities to her keeping, as well as to her own people, whose credit and fair name required that these obligations of the old State should be fairly and honorably adjusted, to do all in her power to bring about a determination of West Virginia's just liability in respect thereto, and if possible the recognition and settlement of the same by that State.

Only after exhausting every means of amicable negotiation, and having her overtures to that end repeatedly refused, and as a last resort, has your Oratrix been constrained at length reluctantly to apply to this, the only tribunal which can afford relief, for an adjudication and determination of this question, of such vast importance to your Oratrix and to all of her people.

XV.

All of the bonds and obligations and other evidences of the indebtedness of the original State of Virginia outstanding and contracted on January 1, 1861, as stated in paragraph I of this bill, except a comparatively insignificant sum, not amounting to one per cent of the aggregate of those liabilities, have been taken up and are now actually held by your Oratrix, and she has the right to call upon West Virginia for a settlement with respect thereto.

They are too numerous and involve too great a number of transactions running through many years, for it to be practicable to exhibit them here in detail, but the original bonds and other evidences of indebtedness so paid off or retired and now held by your Oratrix, will, when it shall be proper to do so, be exhibited to the Master, who shall take the accounts hereinafter prayed for

XVI.

Of the evidences of indebtedness representing principal and interest of the liabilities of Virginia contracted before her dismemberment, those so paid off or retired by your Oratrix and now held by her in her own right, exclusive of the amounts represented by the certificates issued under the funding Acts aforesaid, amount in the aggregate, including the interest to be fairly computed thereon to this date, to a very large sum, considerably in excess of \$25,000,000, by far the greater part if it being now, of course, on account of the interest computed thereon, at the rate of 6% per annum, the then legal rate in both States.

For all of these obligations taken up and payments made on account of the common debt, your Oratrix has in her own
 17 right, a just claim against West Virginia for contribution to the extent of West Virginia's equitable liability therefor.

XVII.

In addition to the above bonds there were outstanding on the 1st day of January, 1861, certain obligations of the State of Virginia as guarantor upon some of the securities issued by internal improvement companies, which your Oratrix was called upon to provide for and settle. They were not comparatively of very large amount, however, and the questions involved in connection therewith can be stated and settled in the account hereinafter prayed for to be taken between the two states; and in such accounts your Oratrix will also ask to have included all such items of debit against the State of West Virginia on account of the property and moneys of the original State which were received or appropriated by West Virginia which may not have been specifically or accurately stated herein. These items of accounting between the two States are so numerous and varied and extend throughout a period of so many years' duration that it is impossible from the nature of the case to state all of them in this bill; and the account between the two States can only be taken and settled, and the balance due your Oratrix thereon ascertained, under the supervision of a Court of Equity.

XVIII.

Your Oratrix charges that the liability of the State of West Virginia, for a just and equitable proportion of the public debt

18 of Virginia, as of the time when the State of West Virginia was created, rests upon the following among many grounds which might be indicated here:

First. The area of the territory now known as the State of West Virginia formed about one-third of the territory of the Commonwealth of Virginia when this public debt was created, and its population included about one-third of that of the original State at the time of its dismemberment. And the State of West Virginia did, by the acquisition and appropriation of such territory, with the population thereof, assume therewith liability for a just and equitable proportion of the public debt created prior to the partition of such territory.

Second. The liability of West Virginia for a just proportion of the public debt of the Commonwealth of Virginia, as it existed prior to the creation and erection of the State of West Virginia, forms part of her very political existence, and is an essential constituent of her fundamental law as shown in the said ordinance adopted at Wheeling on the 20th day of August, 1861, in which the method of ascertaining her liability on account of said debt is prescribed. And this liability is imbedded in the Constitution under which she was admitted as a State into the Federal Union, and was one of the conditions under which she was created a State and admitted into the Union.

Third. The State of West Virginia has further, by the repeated enactments and joint resolution of her legislature, recognized her liability for a just proportion of this debt.

Fourth. The State of West Virginia has, since her creation as a State, received from the State of Virginia real and personal property, amounting in value to many millions of dollars, and held and enjoyed the same, but upon expressed condition that she
19 should duly account for the same in a settlement thereafter to be had between her and the Commonwealth of Virginia.

Fifth. While the transfer of this property, real and personal, and also of certain moneys of the Commonwealth of Virginia, purported to have been made to the State of West Virginia by the Act of "The Restored Government of Virginia," there were in fact represented in said "Restored Government" and in the legislature thereof no other people and no other territory than that which then, as now, constitute the State of West Virginia.

XIX.

The General Assembly of Virginia being anxious to effect a settlement of the portion of the common debt of the undivided State which remained unadjusted, and if possible to bring this about with the friendly co-operation and concurrence of West Virginia, adopted: "*A joint resolution to provide for adjusting with the State of West Virginia the proportion of the public debt of the original State of Virginia proper to be borne by the State of West Virginia, and for the application of whatever may be received from the State of*

West Virginia to the payment of those found to be entitled to the same," approved March 6, 1894. A copy of this resolution will be hereinafter shown as an exhibit to this bill, to be read as a part thereof.

Under this resolution a commission of seven members was appointed for the purpose of carrying into effect the objects expressed therein.

The efforts made by this Commission, acting under the above resolution to bring about a settlement with West Virginia having proved ineffectual, and the overture which the Commission, with the
20 active co-operation of the Honorable Charles T. O'Ferral, the then governor of the Commonwealth made to the authorities of West Virginia for the purpose of bringing about a friendly adjustment having been declined, the General Assembly of Virginia passed the Act approved March 6, 1900, entitled "*An Act to provide for the settlement with West Virginia of the proportion of the public debt of the original State of Virginia proper to be borne by West Virginia, and for the protection of the Commonwealth of Virginia in the premises,*" the purpose of which Act is sufficiently set forth in its title, and a copy of the Act will also be hereinafter shown as one of the exhibits herewith filed.

XX.

The Commission acting under said last-mentioned Act made most earnest efforts to bring about an amicable adjustment of the matters hereinbefore set forth with West Virginia, but all of their efforts in that behalf proved ineffectual and unavailing. An application to this Honorable Court being thus left as the only alternative for Virginia, this suit has been instituted at the request and direction of the said Commission, and in strict conformity with the provisions of the said Act of March 6, 1900, all of which will be more fully and completely shown by the Report of the said Commission dated January 6, 1906, made to the General Assembly of Virginia now in session, a copy of which Report and the documents accompanying the same, and referred to therein, will be exhibited as a part of this Bill.

XXI.

In order that the matters hereinbefore referred to may be more fully shown to the Court, your Oratrix files herewith certain exhibits (eight in number) which she prays may be read as a part of her bill, to-wit:

21 Exhibit Number 1. A copy of the said Act of the General Assembly of Virginia, of March 30, 1871, entitled an Act to provide for the funding and payment of the public debt.

Exhibit Number 2. A copy of the Act of the same General Assembly of March 28, 1879, entitled an Act to provide a plan of settlement of the public debt.

Exhibit Number 3. A copy of the Act of February 14, 1882, of

the same General Assembly, entitled an Act to ascertain and declare Virginia's equitable share of the debt created before and actually existing at the time of the partition of her territory and resources, and to provide for the issuance of bonds covering the same, and the regular payment of the interest thereon.

Exhibit Number 4. A copy of the said Act of the same General Assembly, approved February 20, 1892, entitled an Act to provide for the settlement of the public debt of Virginia not funded under the provisions of an Act entitled, etc.

Exhibit Number 5. A copy of the said Joint Resolution of the said General Assembly of March 6, 1894, providing for the appointment of a Commission.

Exhibit Number 6. A copy of the said Act of March 6, 1900, under which the powers of the said Commission were enlarged and the institution of this suit authorized.

Exhibit Number 7. Showing amounts paid off since January 1, 1861, or assumed and now carried by Virginia on account of the old debt of the undivided State.

Exhibit Number 8. A copy of the report of the said Virginia Commission made to the General Assembly of that State, dated January 6, 1906, together with the accompanying papers.

Forasmuch, therefore, as your Oratrix is remediless save in this form and forum, and to the end that the State of West Virginia may be duly served, through her Governor and Attorney-General, with a copy of this bill, your Oratrix prays that the said State of West Virginia may be made a party defendant to this bill, and required to answer the same, that all proper accounts may be taken to determine and ascertain the balance due from the State of West Virginia to your Oratrix, in her own right and as trustee as aforesaid; that the principles upon which such accounting shall be had may be ascertained and declared, and a true and proper settlement made of the matters and things above recited and set forth; that such accounting be had and settlement made under the supervision and direction of this Court by such Auditor or Master as may by the Court be selected and empowered to that end, and that proper and full reports of such accounting and settlement may be made to this Court; that the State of West Virginia may be required to produce before such Auditor or Master, so to be appointed, all such official entries, documents, reports and proceedings as may be among her public records or official files and may tend to show the facts and the true and actual state of accounts growing out of the matters and things above recited and set forth, in order to a full and correct settlement and adjustment of the accounts between the two States; that this Court will adjudicate and determine the amount due to your Oratrix by the State of West Virginia in the premises; and that all such other and further and general relief be granted unto

your Oratrix in the premises as the nature of her case may require or to equity may seem meet.

And your Oratrix will ever pray, &c.

WILLIAM A. ANDERSON,
Attorney General of Virginia.
HOLMES CONRAD.

EXHIBITS WITH BILL.

In the Supreme Court of the United States.

Original.

COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

EXHIBIT NUMBER 1.

CHAP. 282.—An Act to Provide for the Funding and Payment of the Public Debt.

Approved March 30, 1871.

(Acts G. A. of Va. 1870-1, p. 378.)

Whereas in the formation of the State of West Virginia, there were included within its boundaries about one-third of the territory and population of the State of Virginia; and whereas, in the ordinance authorizing the organization of said state, it was provided that the said state shall take upon itself a just proportion of the public debt of the commonwealth of Virginia prior to the first day of January, eighteen hundred and sixty-one, which provision has not yet been fulfilled, although repeated and earnest efforts in that behalf have been made by this state, and will continue to be made as long as may be necessary; and whereas the people of this commonwealth are anxious for the prompt liquidation of her portion of said debt, which is estimated to be two-thirds of the same; and whereas it has been suggested that the authorities of West Virginia may prefer to pay that state's portion of said debt to the holders thereof and not to this State, as the constitution of this state provides; now, therefore, to enable the State of West Virginia to settle her proportion of said debt with the holders thereof, and to prevent any complications or difficulties which might be interposed to any other matter of settlement, and for the purpose of promptly restoring the credit of Virginia by providing for the prompt and certain payment of the interest upon her proportion of said debt as the same shall become due; therefore,

1. Be it enacted by the general assembly of Virginia, That from and after the passage of this act, no bond, certificate, or other evidence of indebtedness, shall be issued for any portion of the debt of this state; nor shall any interest be paid upon any part or portion of said debt, except as hereinafter provided.

25 2. The owners of any of the bonds, stocks or interest certificates heretofore issued by this state, which are recognized by its constitution and laws as legal, except the five per centum dollar bonds, and what are known as sterling bonds, but including the stock of the old James river company, and the bonds of the James river and Kanawha company guaranteed by this state, may fund two-thirds of the amount of the same, together with two-thirds of the interest due or to become due thereon, to the first day of July, eighteen hundred seventy-one, in six per centum coupon or registered bonds of this state of the denominations of one hundred, and multiples thereof, dated that day, and to become due and payable in thirty-four years after date, but redeemable at the pleasure of the state, after ten years, the interest to be payable semi-annually on the first days of January and July in each year. The bonds shall be made payable to order or bearer, and the coupons to bearer, at the treasury of the state and bonds payable to order may be exchanged for bonds payable to bearer, and registered bonds may be exchanged for coupon bonds, or *vice versa*, at the option of the holder. The coupons shall be payable semi-annually, and be receivable at and after maturity for all taxes, debts, dues, and demands due the state, which shall be so expressed on their face; and the bonds shall bear on their face a declaration to the effect that the redemption thereof is secured by a sinking fund provided for by the law under which they are issued. The holders of the five per centum dollar bonds may in like manner fund the same in like bonds, bearing, however, five instead of six per centum interest. In the funding herein authorized, for any fractional sums less than one hundred dollars, certificates shall be issued bearing the same date and rate of interest, and payable at the same time as the bonds issued under this section; which certificates, in sums of one hundred dollars or any multiple thereof, shall be exchangeable for bonds of the character herein authorized to be issued; and new certificates of like character may be issued for any fractional sums less than one hundred dollars which may remain in making such exchange.

3. Upon the surrender of the old and the acceptance of the new bond for two-thirds of the amount due as provided in the last preceding section, there shall be issued to the owner or owners, for the other one-third of the amount due upon the old bond, stock, or certificate of indebtedness so surrendered, a certificate bearing the same date as the new bond, setting forth the amount of the bond which is not funded as provided in the last preceding section, and that payment of said amount with interest thereon at the rate prescribed in the bond surrendered, will be provided for in accordance with such settlement as shall hereafter be had between the states of Virginia and West Virginia in regard to the public debt of the state of Virgin.

ia existing at the time of its dismemberment, and that the state of Virginia holds said bonds, so far as unfunded, in trust for the holder or his assignees; and provided further, that until such final settlement with West Virginia, there shall be paid upon what are known as sterling bonds, in the manner now prescribed by law, two-thirds of the interest accruing on the principal of said bonds, after July first, eighteen hundred and seventy-one; and for the interest accrued to said date certificates dated on that day shall be issued, drawing the same rate of interest as the bonds, two-thirds of which shall be paid as provided to be paid on the bonds. The remaining one-third of unpaid interest, both on the bonds and certificates, shall be payable in money, and the principal of said certificates in new sterling bonds of the same character as the old, in accordance with such final settlement as shall be made with West Virginia.

4. The treasurer is hereby authorized and directed to forthwith cause to be prepared, engraved or lithographed, registered bonds and bonds with coupons and certificates of the character mentioned in

the second and third sections of this act; and when prepared

27 shall commence the issuance of the same as herein provided.

The bonds and certificates shall be signed by the treasurer, and countersigned by the second auditor; the coupons shall be signed by the treasurer, or a fac simile of his signature shall be stamped or engraved thereon. Each denomination of bonds herein authorized to be issued, both registered and coupon, shall constitute a series, and the bonds of each series shall be numbered from one upwards, as they are issued; and the coupons in addition to the number of the bond to which they are attached, shall be numbered from one to sixty-seven. Each class of certificates authorized to be issued by this act shall be numbered, respectively, from one upwards, and in addition thereto, each certificate shall contain the number and date of the bond or certificate on account of which it is issued. Each bond, certificate of stock, and interest certificate, to be funded as herein provided, shall first be delivered to the second auditor, who shall calculate and determine the amount for which a bond shall be issued, and the amounts for which certificates shall be issued, under the second and third sections of this act; which calculations shall be endorsed, dated and signed by him on the back of such bond, certificate of stock, or interest certificate, and he shall cause a proper registry thereof, together with the date and number of the bond, certificate of stock, or interest certificate, to be made and kept in his office. After such endorsement and registration, the second auditor shall deliver the bond, certificate of stock, or interest certificate, to the treasurer, who shall thereupon deliver to him a bond or bonds and certificates of the character named in the second and third sections of this act, duly signed and numbered, for the several amounts, respectively, according to said endorsement. The second auditor, after making a proper registry of said bond or bonds, and certificates to be kept in his office, shall deliver the same to the person entitled to them. The treasurer shall, by proper endorsement, written or stamped, upon each bond, certificate of stock, or interest

28 certificate so surrendered and delivered to him, cancel the same, and endorse thereon the date of such cancellation, and shall preserve the same in his office until otherwise directed by law. The treasurer shall also have made and preserved in his office a proper registry of every bond and certificate delivered by him to the second auditor, and whenever a coupon bond shall be issued payable to the order of any person or firm, he shall secure and preserve the signature of such person or firm as a part of such registry whenever practicable.

5. Whatever sum may be realized from the claims of this state against Seldon, Withers and Company, and the Chesapeake and Ohio Canal company, and from the sale and disposition of the stocks and bonds, and debts owned by the state in and against any and all railway or other improvement companies, and all sums which may be realized from the claims of this state against the United States, and from any sales of any real estate now belonging to the commonwealth, shall be paid into the treasury of the state to the credit of the sinking fund hereby authorized and created. In the year eighteen hundred and eighty, and annually thereafter, until all the bonds issued under and by authority of this act shall have been paid, there shall be levied and collected, the same as other taxes, a tax of two cents on the one hundred dollars of the assessed valuation of all the property, personal, real and mixed, in the state, which shall be paid into the treasury of the state to the credit of the sinking fund. The treasurer, the auditor of public accounts, and the second auditor are hereby appointed commissioners of the sinking fund, and shall have (a majority acting) the control and management thereof, and shall annually, or oftener, apply whatever sum or sums may be to the credit of the sinking fund, to the purchase and redemption of bonds issued by authority of this act.

6. All necessary expense incurred in the execution of this act shall be paid out of any moneys in the treasury not otherwise appropriated, on the certificate of the correctness of the same, signed by the treasurer and second auditor, and approved by the governor.

7. This act shall be in force from and after its passage.

30

EXHIBIT NUMBER 2.

CHAP. 24—An Act to Provide a Plan of Settlement of the Public Debt.

Approved March 28, 1879.

(Acts G. A. of Va. 1878-9, p. 264.)

Whereas it is believed by the general assembly that the rate of interest heretofore agreed to be paid by the state on the public debt is greater than can be borne without destroying the industrial interests of the state and whereas the council of foreign bondholders

of London, England, and the funding association of the United States of America, limited, have, in view of this belief, expressed their willingness to jointly endeavor to obtain the consent of the creditors to an abatement in the rate of interest; and whereas it is highly expedient, in the best interest of the state, to secure an amicable settlement with the creditors by which the credit of the state may be restored and enhanced, and the aggregate amount of interest payable by the state reduced within limits which will not be too onerous to the population; therefore,

1. Be it enacted by the general assembly of Virginia, That to provide for funding the debt of the state, the governor is hereby authorized to create bonds of the state, registered and coupon, dated the first day of January, eighteen hundred and seventy-nine, the principal payable forty years thereafter, bearing interest at the rate of three per centum per annum for ten years, and at the rate of four per centum per annum for twenty years, and at the rate of five per centum per annum for ten years, payable in the cities of Richmond, New York or London, as hereinafter provided, on the first days of July and January of each year, until the principal is redeemed. The state shall have the option of redeeming any or all of said bonds by the payment of principal and accrued interest at any time after the expiration of ten years from the first day of January, eighteen hundred and seventy-nine, on public notice to the holders of its purpose

to make such redemption. The coupons on said bonds shall
31 be receivable at and after maturity for all taxes, debts, dues and demands due the state, and this shall be expressed on their face. The holder of any registered bond shall be entitled to receive from the treasurer of the state a certificate for any interest thereon, due and unpaid, and such certificate shall be receivable for all taxes, dues and demands due the state, and this shall be expressed on the face of the registered bonds and on the face of such certificate. All obligations created under this act shall be forever exempt from all taxation, direct or indirect, by the state, or by any county or corporation therein, and this shall be expressed on the face of the bonds. The said bonds shall be of the denominations of one hundred dollars, five hundred dollars, and one thousand dollars, at the option of the creditors respectively, and the bonds as well as their coupons shall be payable at Richmond and New York, or if desired, may be made payable in sterling at London, at the fixed rate of exchange of one pound sterling for five dollars. The bonds hereby authorized shall be issued only in exchange for the outstanding debt of the state, as hereinafter provided.

2. For purposes of designation, the outstanding indebtedness of the state is divided into two classes, as follows, to wit:

Class I, which shall be taken to include all tax-receivable coupon bonds, and all registered bonds and fractional certificates which are convertible under the act approved March thirtieth, eighteen hundred and seventy-one, into such tax-receivable coupon bonds.

Class II, which shall be taken to include all bonds funded under the act approved March thirtieth, eighteen hundred and seventy-one;

as amended by the act approved March seventh, eighteen hundred and seventy-two; and also two-thirds of the face value, with two-thirds of the unpaid accrued interest up to the first of July, eighteen hundred and seventy-one, on all unfunded bonds, including sterling bonds.

3. The outstanding indebtedness of the state shall be
32 funded in the new bonds, to be issued under this act, as follows: Bonds shall be presented for exchange with all coupons attached maturing after the date of presentation, and shall be exchanged at the face value of said bonds, dollar for dollar, for the new bonds, with all coupons attached maturing after the date of such presentation: Provided that the proportion of Class II, refunded, shall never exceed in amount one-third (1-3) of the total amount refunded, until eighteen million dollars of Class I have been retired. The new bonds to be issued may be coupon or registered, at the option of the holders, and at the like option coupon bonds may at any time be converted into registered bonds.

4. All due and unpaid interest may be funded under the provisions of this act at the rate of fifty cents on the dollar, and shall be fundable at that rate under the third section of this act, and taken under the provisions of said section, in lieu of bonds of Class II.

5. If on or before the first day of May, eighteen hundred and seventy-nine, the council of foreign bondholders and the funding association of the United States of America aforesaid, shall file with the governor their assent to and acceptance of the terms of this act, the same shall be taken to be a contract between the state and the said corporations, and the governor shall forthwith provide for the preparation of the bonds provided for by this act. The said corporations may present for funding, and in the proportions hereinbefore provided, at least eight millions of dollars of the outstanding obligations of the state prior to the first day of January, eighteen hundred and eighty; and during each period of six months, from and after the thirty-first — December, eighteen hundred and seventy-nine, they may present an additional amount of at least five millions of dollars, until the whole debt is funded; but any excess over said amounts, which may be presented during any of said periods may be estimated in requirement for the succeeding six months. So long as

the said corporations shall present for funding the obligations aforesaid, in the amounts and in the periods aforesaid,
33 they shall have the exclusive privilege of funding the outstanding debt under the provisions of this act: Provided that the said corporations shall arrange to receive the outstanding bonds at the city of Richmond, when the holders thereof shall so desire. But if the said corporations shall fail to file with the governor their assent and agreement as aforesaid by the first day of May, eighteen hundred and seventy-nine, or shall fail to present for funding the outstanding bonds in the proportions and amounts and during the periods hereinbefore specified, then the governor may, in his discre-

tion, make a like contract with responsible parties for the funding of the debt of the state under this act.

6. The rules prescribed under the act approved March thirtieth, eighteen hundred and seventy-one, in respect to preparing, signing and issuing the new bonds and coupons, regulating the same, and in taking in, cancelling and registering the old bonds, shall be observed by the officers of the treasury in the execution of this act, except so far as the same be modified by the provisions of this act: Provided that all bonds and certificates which may be necessary to be printed, shall be printed from a plate which shall be the property of the commonwealth, and shall remain in the keeping or under the control of the second auditor. Whenever an obligation of the state shall be presented to the second auditor to be funded under this act, he shall note the fact and date on the proper register in his office, shall punch a hole through the name of the second auditor, signed or countersigned thereto, and shall issue his warrant upon the treasurer for the new obligations required. There shall be endorsed upon the said warrant a description of the old obligations, and the calculation of principal and interest for which the new obligations are to be issued. The said old obligations and warrant shall be carried by the second auditor to the treasurer, who shall note the fact and date of funding on the proper register in his office, and if he

shall find the warrant correctly drawn, shall sign the proper
34 obligations to be issued, register the same in his office, clip therefrom the past-due coupons and punch the same, and deliver the said obligations to the second auditor, taking his receipt therefor upon his warrant. The second auditor shall countersign the obligation so delivered to him, register the same in his office, and deliver the same to the proper person, taking his receipt therefor. The treasurer shall jacket and file in his office the warrant upon which the new obligations were issued, with the surrendered obligations attached to said warrant, and shall number and date the jacket so as to make it easy for reference. But in cancelling and registering the bonds as above directed, in every bond and coupon surrendered under this act holes shall be punched in one or more places, and in such a manner as to render a new funding of the same impossible, and every bond and coupon so cancelled shall be filed for reference.

7. The owners of all classes of bonds mentioned in this act, who shall exchange their securities for the bonds created under this act, and who shall not have yet received certificates representing the remaining one-third of their principal and interest, due and payable by the state of West Virginia, shall receive certificates of a like character to those issued under the act of March thirtieth, eighteen hundred and seventy-one, when they make such exchange; and the state of Virginia will negotiate or aid the creditors holding all of such certificates issued under this act, or previous acts, in negotiating with the state of West Virginia for an amicable settlement of the claims of such creditors against the state of West Virginia. The acceptance of the said certificates for West Virginia's one-third, issued under

this act, shall be taken and held as a full and absolute release of the state of Virginia from all liability on account of said certificates.

8. The general assembly will, by necessary and appropriate legislation, provide for the prompt payment of the interest on the bonds issued under this act.

9. In the year eighteen hundred and eighty-five, and annually thereafter until all the bonds issued under and by authority
35 of this act are paid, there shall be levied and collected the same as, and together with other taxes, a tax of two cents on the one hundred dollars of the assessed valuation of all the property, personal, real and mixed, in the state, which shall be paid into the treasury of the state to the credit of the sinking fund. The treasurer, the auditor of public accounts, and second auditor are hereby appointed commissioners of the sinking fund, and shall have (a majority acting) the control and management thereof, and shall annually, or oftener, apply whatever sum or sums may be to the credit of the sinking fund to the purchase and redemption of bonds issued under this act. All the certificates of debt which shall be funded, redeemed or purchased under this act shall be cancelled by the second auditor, and delivered by him to the treasurer of the commonwealth at the time of payment therefor, who shall carefully preserve the same in his office. All certificates of debt acquired under the operation of the sinking fund, created by the act of March thirty, eighteen hundred and seventy-one, shall also be cancelled and delivered.

10. Executors, administrators, and others acting as fiduciaries, may invest in the bonds issued under this act, and the same shall be considered a lawful investment.

11. The treasurer shall, upon the first days of July, eighteen hundred and seventy-nine, and January, eighteen hundred and eighty, and upon the same days in each year, pay or cause to be paid to the holders thereof the half-yearly interest then due upon each of the bonds of the commonwealth issued under this act.

12. Whenever there shall not be a sufficient amount of money in the treasury of the state to meet the the accruing interest on the said bonds promptly, the auditor is hereby authorized and directed, by and with the advice of the governor of Virginia, to raise by temporary loan, to be returned out of the accruing revenues of the state, a sum sufficient to enable him to meet promptly the said interest as it accrues. And in case the auditor shall not be able to
36 raise a sufficient sum for the said purpose by loans, he is hereby authorized and directed to issue non-interest-bearing certificates of indebtedness of this state, to be signed by himself and countersigned by the treasurer, and properly registered in the offices of the auditor and treasurer, for the sum of one dollar and multiples thereof, the same to be printed from plates, which shall be the property of the state, and to sell the same at not less than a minimum price to be fixed by the commissioners of the sinking fund, which shall not be less than seventy-five cents upon the dollars. The said certificates shall be receivable for all taxes, debts, dues and demands due the state, and this shall be expressed on their face. The amount of such

certificates which may be issued at any one time shall be fixed by the commissioners of the sinking fund, and the proceeds of the sale thereof shall be devoted exclusively to the payment of interest as aforesaid. The auditor shall report regularly to the general assembly the amount and character of certificates issued under this act, and the net proceeds thereof. In case the auditor shall not be able to borrow the sums needed as aforesaid without security, he shall be and is hereby authorized to hypothecate such amounts of the said certificates as may be fixed on by the commissioners of the sinking fund, at a value to be fixed as aforesaid, but in no case to be at a less value than seventy-five cents upon the dollar; and in case of a sale of said certificates, whether they may have been so hypothecated or not, they shall be offered for sale in suitable and proportionate amounts in the different counties, towns and cities of this state, so far as practicable, under regulations to be fixed by the commissioners of the sinking fund. The said certificates shall be received by the treasurer of the state, and be cancelled on receipt thereof, under the same regulations and prohibitions now existing in relation to coupons for interest on the public debt, except that no tax shall be deducted therefrom, and the fact of their cancellation shall be noted on the said registers.

13. The act approved March fourteenth, eighteen hundred and seventy-eight, and all acts inconsistent with the provisions of this act, are hereby repealed.

14. This act shall be in force from its passage.

38

EXHIBIT NUMBER 3.

CHAP. 84.—An act to ascertain and declare Virginia's equitable share of the debt created before and actually existing at the time of the partition of her territory and resources, and to provide for the issuance of bonds covering the same, and the regular and prompt payment of interest thereon.

Approved February 14, 1882.

Preamble.—Whereas to the end which this act comprehends, a full statement of the debt is essential; and whereas the following has been carefully made up from the records of the second auditor's office of the State, it is confidently submitted as presenting a true state of the account between the State and her creditors—the account is as follows:

Interest. Principal.

Principal outstanding at this date:

1861, January 1st, Sterling debt bearing 5 per cent. interest.....	\$ 1,973,000 00
Dollar debt bearing 6 per cent. interest.....	29,533,582 90
Debt guaranteed bearing 6 per cent. interest.....	294,130 00

\$31,800,712 90

Total principal

Interest:

Past due and uncalled for at this date	101,023 63
Maturing at this date, January 1st, 1861.....	944,156 38

\$1,045,183 01

Total interest

1863, July 1st. The State of West Virginia was formally admitted into the Union June 20th, 1863. The property and resources of Virginia, upon which the above debt has been founded, were by this partition of the old State, reduced, one-third of her territory and one-fifth of her population going to form West Virginia. This and the consequences of war to her and her people made a loss of full \$500,000,000 of property and her taxable values were reduced from \$723,000,000 to \$336,000,000, and her annual revenues from over \$4,000,000 to \$2,500,000.

39

Principal July 1st, 1863:

Sterling debt bearing 5 per cent. interest.....	\$1,973,000 00
Dollar debt bearing 6 per cent. interest.....	29,827,712 90
Bonds issued since January 1st, 1861, in discharge of debts contracted, and appropriations made prior to that date	1,340,500 02

33,141,212 92

Total principal July 1st, 1863

Interest July 1st, 1863:

Past due January 1st, 1861, and uncalled for.....	1,045,183 01
Accrued between January 1st, 1861, and July 1st, 1863, inclusive	4,909,533 07

5,954,716 08

Total interest to July 1st, 1863, inclusive

1863, July 1st.

Two-thirds of the above debt, principal and interest, to this date is assumed as Virginia's equitable portion, in consideration of the partition of her territory, population, and resources, upon the well established principle that debt in such cases follows territory. Upon that basis, Virginia's portion of the debt of the entire State is—

Principal:

Two-thirds of \$1,973,000 sterling debt..... 1,315,333 34
 Two-thirds of \$31,168,212.92 dollar debt..... 20,778,808 62

Total principal, two-thirds, to July, 1863, inclusive

Interest:

Two-thirds of \$5,954,716.08, amount in arrears at that date, inclusive

Less amount of interest paid by Virginia since January 1st, 1861, exclusively out of revenues of the present State of Virginia, the territory and resources of West Virginia being inaccessible during that period, and contributing nothing thereto.....

Balance of interest due and unpaid July 1st, 1863, inclusive.....

1871, July 1st.

Principal July 1st, 1863, in sterling bonds as above

Principal July 1st, 1863, in dollar bonds as above

Less amount of dollar bonds redeemed between July 1st, 1863, and this date

Total dollar bonds

Total principal

Interest from July 1st, 1863, to July 1st, 1871, inclusive:

On \$1,315,333.34 sterling bonds at 5 per cent. 526,133 28
 On \$20,778,808.62 dollar bonds at 6 per cent. 9,973,828 14

10,499,961.42

22,094,141 96

307,376 17

18,383,692 29

Less amount covering average time of the redemption of the \$3,710,449.67 dollar bonds redeemed 445,257 58
 Less amount paid in money during that period—July 1st, 1863, to July 1st, 1871, inclusive 3,594,289 11

4,039,546 69

6,460,414 73

Interest:

Two-thirds of \$5,954,716.08, amount in arrears at that date, inclusive 3,969,810 72
 Less amount of interest paid by Virginia since January 1st, 1863, exclusively out of revenues of the present State of Virginia, the territory and resources of West Virginia being inaccessible during that period, and contributing nothing thereto 3,662,434 55

307,376 17

Balance of interest due and unpaid July 1st, 1863, inclusive.....

1871, July 1st.

Principal July 1st, 1863, in sterling bonds as above 1,315,333 34

Principal July 1st, 1863, in dollar bonds as above \$20,778,808 62

Less amount of dollar bonds redeemed between July 1st, 1863, and this date 3,710,449 67

Total dollar bonds 17,068,358 95

Total principal 18,383,692 29

Interest from July 1st, 1863, to July 1st, 1871, inclusive:

On \$1,315,333.34 sterling bonds at 5 per cent. 526,133 28

On \$20,778,808.62 dollar bonds at 6 per cent. 9,973,828 14

10,499,967 42

Less amount covering average time of the redemption of the \$3,710,449.67 dollar bonds redeemed 445,257 58

Less amount paid in money during that period—July 1st, 1863, to July 1st, 1871, inclusive	3,594,289 11		
	<u>4,039,546 69</u>		6,460,414 73
Add interest accrued to July 1st, 1871, as above		6,767,790 90	
Total		<u>18,041,288 93</u>	
Less amount paid between July 1st, 1871, and October 1st, 1881—in money....	\$2,415,973 56		
In coupons	8,707,615 50		
Less amount covering average time of the redemption of the \$1,540,658.12 bonds redeemed	331,800 00		
Less tax-receivable coupons outstanding October 1st, 1881, and to be paid as part of the floating debt	895,722 00		
Less tax-receivable coupons maturing in January and July, 1882	1,117,724 87		
Amount of interest (<i>special</i>):			
Redeemed and cancelled	380,110 02		
Total deductions	<u>13,848,945 95</u>		
Balance of interest to July 1st, 1882		4,192,342 98	
Total debt to July 1st, 1882:			
Principal, as above			16,843,034 17
Interest, as above			<u>4,192,342 98</u>
Total			<u>21,035,377 15</u>
Including bonds held by the literary fund to the amount of \$1,428,245.25, an interest on the same—in arrears July 1st, 1881, \$516,322.19—and interest added from that date to July 1st, 1882, \$85,694.71, making \$602,016.90 included in the above sum of \$4,192,342.98.			
Total debt			<u>\$21,035,377 15</u>

41 And whereas by this account it appears that Virginia owes her creditors, as of the first — July, eighteen hundred and eighty-two, including the bonds held by the Literary fund and arrears of interest thereon cast to such date, twenty-one million, thirty-five thousand, three hundred and seventy-seven dollars and fifteen cents; and that she may cause to be issued her own bonds for the same, and provide for the certain payment of interest thereon; that is for her equitable share of the bonds known as consols, and here designated as class A, and whereof there are outstanding fourteen million three hundred and sixty-nine thousand nine hundred and seventy-four dollars and eighty-one cents; and for her equitable share of the bonds known as ten-forties, and here designated as class B, and whereof there are outstanding eight million five hundred and seventeen thousand six hundred dollars; and for her equitable share of the bonds known as pæler, and here designated as class C, and whereof there are outstanding two million three hundred and ninety-four thousand three hundred and five dollars and twelve cents; and for her equitable share of the interest thereon, designated as class D, and whereof there is now in arrears nine hundred and twenty-eight thousand eight hundred and eight-seven dollars and forty-five cents, and counted to the first of July, eighteen hundred and eighty-two, makes the amount of such interest then to be in arrears, one million seventy-two thousand five hundred and forty-five dollars and seventy-five cents; and for her equitable share of the bonds known as unfunded bonds—dollar and sterling—here designated as class E, and whereof there are now outstanding, computed at two-thirds, three million seven hundred and seventy-three thousand four hundred and ninety-three dollars and sixty-eight cents; and for her equitable share of the interest thereon now in arrears, two million six hundred and thirty-six thousand four hundred and forty-four dollars and thirty-four cents, and counted to the first of July, eighteen hundred and eighty-two, making as of that date (two hundred and twenty-six thousand four hundred and nine dollars and sixty-two cents more) the sum of two million eight hundred and sixty-two thousand eight hundred and fifty-three dollars and ninety-six cents, and here designated as class F; and for her equitable share of the bonds held by the commissioners of the Literary fund, whereof there are one million four hundred and twenty-eight thousand two hundred and forty-five dollars and twenty-five cents; and whereas the rate of interest which any people can safely undertake to pay must be determined by the measure of their productive resources; and whereas these have long been burdened by a rate of taxation which is conceded to be as high as can be endured; and whereas the means of prompt and certain payment should be apparent to the creditor, while the people have assurance for the support of the government and the maintenance of their schools, as required by the constitution; and whereas the net revenues of the state, remaining and so derived, after providing for the proper and gradual liquidation of the balance of the moneys heretofore diverted from
42 the public free school fund, after liquidating gradually the ar-

rearages to the Literary fund, and leaving some small margin for the immediate and subsequent exigencies, which are, and are likely to be demanded by the public welfare—notably in respect of the humane institutions now inadequate to the proper accommodation of that unfortunate class of every population—do not warrant the assumption of a larger rate of interest than three per centum upon the full amount of Virginia's equitable share of the debt of the old and entire state, as the same is ascertained and now formally declared by the foregoing account; therefore,

1. Be it enacted by the general assembly of Virginia, That the board of commissioners of the sinking fund of the state, be, and they are hereby empowered and directed to create bonds, registered and coupon, to such extent as may be necessary to comply with the provisions of this act.

2. The said bonds shall be dated July first, eighteen hundred and eighty-two, and be payable at the office of the treasurer of the state on the first day of July, nineteen hundred and thirty-two; provided that the state may, at any time and from time to time, after July first, nineteen hundred, redeem any part of the same, principal and interest, at par. In case of such redemption before maturity, the bonds to be paid, shall be determined by lot by said board of commissioners, and notice of the bonds so selected to be paid, shall be given in a newspaper published in Richmond, New York, and London, England, when interest from and after ninety days from the date of such publication in London, shall cease upon the bonds so designated to be paid.

3. The form of the bond shall be as follows, to-wit:

The commonwealth of Virginia acknowledges herself indebted to ——— (in the case of a coupon bond to the bearer, and in the case of a registered bond, inserting the name of the person or corporation) in the sum of ——— dollars, which she promises to pay in lawful money of the United States at the office of the treasurer of the state, Richmond, Virginia, on the first day of July, nineteen hundred and thirty-two, with the option of payment at par, principal, and interest, before maturity, at any time after July first, nineteen hundred; and interest at the office of the treasurer of the state, in such lawful money, on the first days of January and July, at the rate of three per centum per annum until paid (according to the tenor of the annexed coupons, in the case of coupon bonds).

In testimony whereof, witness the signature of the treasurer and the counter-signature of the second auditor, hereto affixed according to law.

———, *Treasurer.*

———, *Second Auditor.*

4. The form of coupon for coupon bonds shall be as follows, to-wit:

43

No. ——— (of bond).

The commonwealth of Virginia will pay to bearer ——— dollars, in

lawful money of the United States, at the office of the treasurer, Richmond, Virginia, on the first day of January and July, alternately—the first coupon to be payable January first eighteen hundred and eighty-three.

— — —, *Treasurer.*

\$—.

Each coupon to be impressed on the back with its number, in the order of maturity, from one forward.

5. The said board of commissioners are authorized to issue such bonds, in denominations of five hundred and one thousand dollars, as may be necessary to carry out the provisions of this act, each denomination to be of a different tint: Provided that registered bonds may be issued of any denomination, multiple of one hundred; all registered bonds to be of the same tint; and they are authorized and directed to issue such bonds, registered or coupon, in exchange for the outstanding evidences of debt hereinbefore numerated, including the bonds held by the literary fund, as follows, that is to say:

(a) For her equitable share of class A, at the rate of fifty-three per centum; that is to say, fifty-three dollars of the bonds authorized under this act (principal and accrued interest, at par, from the preceding period of maturity to the date of exchange,) are to be given for every one hundred dollars, face, principal and accrued interest from the preceding semi-annual period of maturity to the date of exchange of such evidences of debt, and for any interest which may be past due and unpaid upon the same, funded bonds issued under this act may be given dollar for dollar.

(b) For her equitable share of class B, at the rate of sixty per centum, reckoning and accounting for any interest, as provided in the case of class A.

(c) For her equitable share of class C, at the rate of sixty-nine per centum, reckoning any current interest, at the date of exchange, as in the cases of classes A and B, and accounting for the same as provided in class D.

(d) For her equitable share of class D, at the rate of eighty per centum.

(e) For her equitable share of class E, at the rate of sixty-nine per centum, reckoning any current interest, at the date of exchange, as in the cases of classes A, B, and C, and accounting for the same as provided in class F.

(f) For her equitable share of class F, at the rate of sixty-three per centum.

(g) For her equitable share of the bonds of the Literary fund, as in the case of class C; her equitable share of the arrearages of interest—three hundred and seventy-nine thousand two hundred seventy dollars—to be paid in money.

6. For all balances of such indebtedness, constituting West Virginia's share of the old debt, principal and interest, in the settlement of Virginia's equitable share as aforesaid, the said board of sinking fund commissioners shall issue a certificate as follows:

44

No. —.

The commonwealth of Virginia has this day discharged her equitable share of the (registered or coupon, as the case may be) bond for — dollars, held by —, dated the — day of —, and numbered —, leaving a balance of — dollars, with interest from —, to be accounted for by the state of West Virginia, without recourse upon this commonwealth.

Done at the capitol of the state of Virginia, this — day of —, eighteen —.

— —, *Second Auditor.*

— —, *Treasurer.*

7. The said board of commissioners are empowered to issue for any fractional part of one hundred dollars of the indebtedness funded under this act, the following certificate:

Fractional Certificate.

Register No. —.

Transaction No. —.

This certificate entitles the holder hereof to the sum of — dollars, fundable at its face in the bonds of the commonwealth of Virginia, authorized by an act approved — day of —, eighteen hundred and eighty-two, when presented with certificate of like tenor or in conjunction with other evidences of debt fundable under said act in amounts of one hundred dollars and multiples thereof.

Done at the capitol of Virginia, this — day of —, eighteen hundred and eighty —.

— —, *Second Auditor.*

— —, *Treasurer.*

The certificates so issued shall be registered by the second auditor in a register kept for that specific purpose, giving the date and number of the transaction to which it relates, the amount of the same, and the name of the person or corporation to whom it was issued; and as such certificates are refunded, the same shall be canceled and preserved as herein provided in respect to the evidences of debt refunded.

8. All the bonds and certificates of debt and evidences of past-due and unpaid interest taken in under the provisions of this act, shall be canceled by the treasurer in the presence of the board of commissioners of the sinking fund as the same are required, and by the treasurer the same shall be carefully preserved until such time as the General Assembly may otherwise direct. A schedule of the bonds, certificates and other evidences of debt so canceled, from time to time, shall be certified by said board and filed with the treasurer for preservation.

9. All the coupons and registered bonds and fractional certificates issued under this act, shall be separately registered by the second

auditor in books kept for the specific purpose; and in each case giving the date, number and amount of the obligations issued, and the name of the person or corporation to whom issued, and the date, number, amount and description of the bond, bonds or indebtedness surrendered.

10. The plates from which the bonds and fractional certificates authorized by this act, are printed, shall be the property of the commonwealth, and shall remain in the keeping of the said board of commissioners of the sinking fund.

11. In the year eighteen hundred and ninety, and annually thereafter until all the bonds issued under and by authority of this act are paid, there shall be set apart of the revenue collected from the property of the state each year, two and one-quarter per centum upon the bonds at the time outstanding, which shall be paid into the treasury to the credit of the sinking fund; and the commissioners of the said sinking fund shall, annually or oftener, apply the same to the redemption or purchase (at a rate not above par) of the bonds issued under this act, and the bonds so redeemed shall be canceled by the said board, and the same registered by the second auditor in a book to be kept for the purpose, giving the number, the date of the issue, the character, the amount, and the owner at the time of purchase of the bonds so redeemed and canceled; and in case no such purchase of bonds can be made, then the amount which can be redeemed shall be called in by lot as provided in section two of this act.

12. Executors, administrators and others acting as fiduciaries, may exchange any state bonds held by them as provided, for bonds issued under this act, when so authorized by the court having jurisdiction in the premises, and the same, when so made, shall be considered a lawful investment.

13. The treasurer of the commonwealth is authorized and directed to pay the interest on the bonds issued under this act, as the same shall become due and payable, out of any money in the treasury not otherwise appropriated.

14. All necessary expenses incurred in the execution of this act, shall be paid out of any money in the treasury not otherwise appropriated, on the warrants of the auditor of public accounts drawn upon the treasurer, on the order of the board of sinking fund commissioners.

15. That from and after the passage of this act, no bonds, certificates, or other evidences of indebtedness, shall be issued for any portion of the debt of this state, nor shall any interest be paid upon any part or portion of said debt, except as hereinbefore provided.

16. This act shall be in force from its passage.

CHAP. 325. An act to provide for the settlement of the public debt of Virginia not funded under the provisions of an act entitled An act to ascertain and declare Virginia's equitable share of the debt

created before and actually existing at the time of the partition of her territory and resources, and to provide for the issuance of bonds covering the same, and the regular and prompt payment of the interest thereon, approved February 14, 1882.

Approved February 20, 1892.
(Acts G. A. of Va. 1891-92, p. 533.)

Whereas by a joint resolution of the general assembly of the state of Virginia, adopted on the third day of March, eighteen hundred and ninety, a commission was appointed on the part of Virginia to receive propositions for funding the debt of the state not funded under the act known as the "Riddleberger bill," approved February fourteenth, eighteen hundred and eighty-two, from a properly constituted representative of her creditors; and

Whereas said Virginia debt commission has submitted a report to the general assembly, wherein it appears that under a certain agreement, dated May twelfth, eighteen hundred and ninety, lodged with the Central Trust Company of New York, Frederick P. Oleott, William L. Bull, Henry Budge, Charles D. Dickey, Junior, Hugh R. Garden, and John Gill, constituting a committee for certain of the creditors of Virginia, called the "Bondholders' committee," have proposed to said commission to surrender to the state in bulk not less than twenty-three million of dollars of the public debt, unfunded under said act approved February fourteenth, eighteen hundred and eighty-two, in exchange for an issue of new bonds, as hereinafter specified, the same to be apportioned between the several classes

47 of creditors by a tribunal which the said creditors have themselves appointed; and that, in pursuance of said proposal an agreement has been entered into unanimously between the said commission and the said bondholders' committee, subject to approval by the general assembly, whereby in exchange for the said unsettled obligations of the state held by the public, which were issued prior to February fourteenth, eighteen hundred and eighty-two (exclusive of evidences of debt held by the public institutions of the commonwealth pursuant to law and by the United States,) together with the interest thereon to July first, eighteen hundred and ninety-one, inclusive, aggregating about twenty-eight million of dollars, there shall be issued nineteen million of dollars of new bonds, dated July first, eighteen hundred and ninety-one, and maturing one hundred years from said date, with interest thereon at the rate of two per centum per annum for ten years from said first day of July, eighteen hundred and ninety-one, and three per centum per annum for ninety years thereafter to the date of maturity, said interest to be payable semi-annually of which aggregate debt of about twenty-eight million of dollars the said bondholders committee represent that they now hold and agree to surrender not less than twenty-three million of dollars and

Whereas said report and agreement contemplate the surrender of the obligations held by the bondholders' committee as an entirety, and do not contemplate an apportionment by the general assembly

between the various classes of creditors so represented by said bondholders' committee, the same having been committed to a distributing tribunal, as hereinbefore recited and

Whereas it is the desire and intention of the general assembly that a settlement of all the other outstanding obligations of the state (except those issued under the act of February fourteenth, eighteen hundred and eighty-two, the evidences of debt held by the public institutions of the state in pursuance of law and by the United States) as well as those controlled by the bondholders' committee, as aforesaid, shall be made under the provisions of this act; therefore,

1. Be it enacted by the general assembly of Virginia, That
48. the commissioners of the sinking fund, a majority of whom may act, be, and they are hereby, empowered and directed to create "listable" engraved bonds, registered and coupon, to such an extent as may be necessary to issue nineteen million of dollars of bonds in lieu of the twenty-eight million dollars of outstanding obligations, not funded under the act approved February fourteenth, eighteen hundred and eighty-two, hereinbefore recited.

2. The said bonds shall be dated July first, eighteen hundred and ninety-one, and be payable at the office of the treasury of the state, or at such agency in the city of New York, as may be designated by the state, on the first day of July, nineteen hundred and ninety-one, and shall bear interest from date, payable semi-annually on the first days of January and July in each year, at the rate of two per centum per annum for the first ten years and three per centum per annum for the remaining ninety years; the said interest may be payable in Richmond, New York and London, or at either place, as may be designated by the state; provided that the state may at any time, and from time to time, after July first, nineteen hundred and six, redeem at par any part of the principal with accrued interest. In case of such redemption before maturity, the bonds to be paid shall be determined by lot by said commissioners of the sinking fund, and notice of the bonds so selected to be paid shall be given by publication beginning at least ninety days prior to an interest-due date, in a newspaper published in Richmond, Virginia, one in New York city, and one in London, England; and the interest from and after the next succeeding interest-due date shall cease upon the bonds so designated to be paid: provided that no registered bonds shall be so redeemed while there are any coupon bonds outstanding.

3. The form of the bonds shall be substantially as follows, to-wit:
Issued under act of assembly, approved — day of —, eighteen hundred and ninety-two.

The commonwealth of Virginia acknowledges herself to be
49 indebted to — (in case of a coupon bond to the bearer, and in case of a registered bond inserting the name of a person or corporation, or assigns), in the sum of — dollars, which she promises to pay in lawful money of the United States, at the office of the treasurer of the state, or at such agency in the city of New York as may be designated by the state, on the first day of July, nineteen hundred and ninety-one, with the option of payment at par with

accrued interest, before maturity at any time after July first, nineteen hundred and six, and interest, at the office of the treasurer of the state, or at the agencies of the state in New York city and London England, or at either place, as may from time to time be designated by the state, in such lawful money aforesaid, at the rate of two per centum per annum for ten years from the first day of July, eighteen hundred and ninety-one, and at the rate of three per centum per annum thereafter until paid, payable semi-annually on January first and July first in each year (according to the tenor of the annexed coupon bearing the engraved signature of the treasurer of the commonwealth in case of coupon bonds). And this obligation is hereby made exempt from any taxation by the said commonwealth of Virginia, or any county or municipal corporation thereof.

In testimony whereof, witness the signature of the treasurer and the countersignature of the second auditor of the commonwealth of Virginia, hereto affixed according to law.

[SEAL.]

_____, *Treasurer.*

_____, *Second Auditor.*

4. The form of coupon for coupon bonds shall be substantially as follows, to-wit:

Coupon No. —.

On the first day of — the commonwealth of Virginia will pay to bearer — dollars in lawful money of the United States, at the office of the treasurer of the state, or at the agencies of the state in New York city or London, England, or at either place, as may be designated by the state; the same being six months' interest on bond number —. — dollars.

_____, *Treasurer.*

Each coupon to be impressed on the back with its number, in order of maturity, from number one consecutively.

5. Said commissioners of the sinking fund are authorized to issue coupon bonds in denominations of five hundred and one thousand dollars each, as may be necessary to carry out the provisions of this act: provided that registered bonds may be issued of the denominations of one hundred dollars, five hundred dollars, one thousand dollars, five thousand dollars, ten thousand dollars and they are authorized and directed to issue said bonds, registered or coupon, in exchange for the said outstanding obligations up to and including July first, eighteen hundred and ninety-one (exclusive of evidences of debt held by public institutions of the commonwealth as aforesaid and by the United States) as follows:

A. Said bondholders' committee may at any time on or before the thirtieth day of June, eighteen hundred and ninety-two, present to said commissioners for verification bonds and other evidences of debt, and coupons or other evidences of interest thereon, obligations of the state of Virginia, held by said committee, for exchange as

aforesaid; and said commissioners shall determine whether the obligations so presented are genuine obligations of the state and whether the coupons or other evidences of interest represent interest accrued on such obligations (exclusive of evidences of debt held by public institutions of the commonwealth as aforesaid and by the United States).

B. Such of the obligations so presented for verification as may be determined by said commissioners to conform to the requirements of paragraph A hereof, shall be sealed in convenient packages as the examination proceeds. Each of the packages shall be numbered, and upon each package shall be endorsed the amount and character of the obligations therein contained. Such endorsement on each package shall be signed by said commissioners or a majority thereof, and the package shall then be delivered to said committee or its agent. Said commissioners shall keep in a book to be provided for the purpose a record of the numbers of all such packages and of the amount and character of the obligations contained in each. Such obligations presented by said bondholders' committee as do not conform to the requirements of paragraph A hereof shall be returned to said committee; but said commissioners shall keep a record thereof in the book aforesaid.

C. After said bondholders' committee shall have presented to said commissioners for verification bonds and other evidences of debt and coupons, or other evidence of interest thereon accrued on or before July first, eighteen hundred and ninety-one, obligations of the state of Virginia, all conforming to the requirements of paragraph A hereof, as determined by said commissioners, and amounting in the aggregate to not less than twenty-three million of dollars, after deducting one-third of the principal and interest of such obligations as were issued prior to the thirtieth day of March, eighteen hundred and seventy-one, and also deducting one-third of the principal and interest of such obligations as were issued under the act approved the thirtieth day of March, eighteen hundred and seventy-one, as do include West Virginia's proportion, said bondholders' committee may at any time on or prior to the thirtieth day of June, eighteen hundred and ninety-two, present the same in bulk to said commissioners for surrender and exchange as herein provided. All coupons matured or to mature on coupon bonds after July first, eighteen hundred and ninety-one, or coupons of like class and amount, or the face value thereof in cash, shall be surrendered with such bonds, the said cash to be returned if proper coupons are subsequently tendered. And when the said bondholders' committee shall have presented for exchange the obligations aforesaid to an amount of
52 twenty-three million of dollars or more, if the engraved bonds hereinbefore authorized are not ready for exchange, the said commissioners shall, upon application of said bondholders' committee, issue to said bondholders' committee a manuscript registered bond of the state of Virginia, substantially of the form of the bond hereinbefore specified, for the aggregate amount to which the said committee may be entitled for the obligations so presented under

this act, the said bond to be exchangeable for the engraved bonds aforesaid of character and amount required by said committee, as prescribed in this act, and interest in the meantime on said manuscript bond shall be paid as herein provided for on the engraved bonds.

D. The said new bonds shall be issued to said bondholders' committee by the said commissioners in the following proportion, to-wit: nineteen thousand dollars of the new bonds to be created under this act shall be issued for every twenty-eight thousand of old outstanding obligations (principal and interest to July first, eighteen hundred and ninety-one), as aforesaid, surrendered by said bondholders' committee to the said commissioners, after the deductions provided for in paragraph C of this section and a proportionate amount of said new bonds shall be issued for smaller sums of said outstanding obligations so surrendered: provided that no certificates issued on account of the proportion of West Virginia of the obligations of the state shall be funded under this act. When said bondholders' committee shall have surrendered and exchanged such obligations as aforesaid to the amount of at least twenty-three million dollars, said committee may at any time thereafter up to and including the thirtieth day of June, eighteen hundred and ninety-two, present to said commissioners for verification, surrender, and exchange additional obligations, principal and interest, as aforesaid all coupons matured or to mature on coupon bonds after July first, eighteen

hundred and ninety-one, or coupons of like class and amount,

53 or the face value thereof in cash, to be presented with such bonds, the cash, if paid, to be returned if proper coupons are subsequently tendered. After said commissioners shall have determined that said obligations conform to the requirements of paragraph A hereof, said commissioners shall accept the obligations so presented for surrender and exchange by said committee, and shall deliver to said committee in exchange therefor new bonds issued under the provisions of this act in the same proportion as is set out in this paragraph of this section, after making the deductions provided for in paragraph C of this section.

E. If on making the exchange provided for in this act said committee shall be found entitled to a fractional amount or amounts less than one hundred dollars in addition to the new bonds delivered to it, said commissioners of the sinking fund shall issue to the committee a certificate or certificates for such amount or amounts. Such fractional certificates shall be exchangeable for the bonds authorized by this act to be issued in sums of one hundred dollars, or any multiple thereof, and certificates of like character shall be issued for any fractional amount which may remain in making the exchange.

6. For all balances of the indebtedness, constituting West Virginia's share of the old debt, principal and interest, in the settlement of Virginia's equitable share of the bonds authorized to be exchanged under this act, the said share having been heretofore determined by the commonwealth of Virginia, the said commissioners shall issue certificates substantially in the following form, viz:

No. —. The commonwealth of Virginia has this day discharged her equitable share of the (registered or coupon, as the case may be), bond for — dollars, dated — day of —, and No. —, leaving a balance of — dollars, with interest from —, to be accounted for to the holder of this certificate by the state of West Virginia, without recourse upon this commonwealth.

Done at the capitol of the state of Virginia, this — day
54 of —, eighteen hundred and ninety-two.

— —, *Second Auditor.*

— —, *Treasurer.*

The certificates so issued under sections five and six of this act shall be recorded by the second auditor in a book kept for that purpose, giving the date and number of the transaction to which it refers, the amount of certificates, and the name of the person or corporation to whom issued and delivered and as such certificates, authorized by paragraph E, section five of this act, are exchanged, the same shall be cancelled and preserved as herein provided in respect to the evidences of debt refunded.

7. The commissioners of the sinking fund are hereby authorized and required to receive on deposit for verification, classification and exchange such of the said obligations of the state as may be presented to said commissioners; provided, that said commissioners shall not receive on deposit for the purposes aforesaid any outstanding obligations of the state which have been once deposited with the bond-holders' committee, or may be hereafter deposited with them; the said verification and exchange for the new bonds of the obligations so deposited to be conducted in the same manner as hereinbefore provided with respect to the obligations deposited with the said bond-holders' committee, and the said commissioners of the sinking fund shall issue to and distribute amongst said depositing creditors after they have fully complied with the terms of this act, in exchange for the obligations so deposited, bonds authorized by this act as follows, namely to each of the several classes of said depositing creditors the same proportion, as nearly as may be found in their judgment practicable by the commissioners of the sinking fund, as the same class shall receive under the distribution which shall be made by the commission for the creditors represented by the bondholders' committee: provided that no obligations shall be received for such deposit after the thirtieth day of June, eight-

55 en hundred and ninety-two, nor shall any coupon bonds be received which do not have attached thereto all the coupons maturing after July first, eighteen hundred and ninety-one but for any such coupons as may be missing, coupons of like class and amount, or the face value thereof in cash, may be received the said cash, if paid, to be returned if proper coupons are subsequently tendered and each depositor shall, when he receives his distributive share of the said new issue of bonds, pay to the commissioners of the sinking fund three and one-half per centum in cash of the par value of the bonds received by him, or a commission equal in amount to that which may at any time hereafter be fixed by the said com-

mittee of bondholders upon any bonds deposited with them, not, however, in any case to exceed three and one-half per centum; and said sinking fund commissioners shall cover the fund thus received into the treasury of the commonwealth.

8. All the coupon and registered bonds issued under this act shall be separately recorded by the second auditor in books provided for the specific purpose, in each case giving the date, number, amount of obligations issued, and the name of the person or corporation to whom issued, and the date, number, amount and description of the obligations surrendered.

9. All the bonds and certificates of debt, and evidences of past due and unpaid interest, taken in under the provisions of this act, shall be cancelled by the treasurer in the presence of the commissioners of the sinking fund, or a majority thereof, as the same are acquired, and by him carefully preserved, subject to disposition by the general assembly; a schedule of the bonds, certificates, and other evidences of debt so cancelled shall be certified by said commissioners and filed by the treasury for preservation.

10. In the year nineteen hundred and ten, and annually thereafter, there shall be set apart of the revenue collected from the property of the state each year up to and including the year nineteen hundred and twenty-nine, one half of one per cent, upon the bonds issued under this act, as well as upon the outstanding bonds issued under act approved February fourteenth, eighteen hundred and eighty-two; and in the year nineteen hundred and thirty, and annually thereafter until all the bonds issued under this act and the said act approved February fourteenth, eighteen hundred and eighty-two, are paid, there shall be set apart of the revenue collected from the property of the state each year one per cent, upon the outstanding bonds issued under the aforesaid acts, which shall be paid into the treasury to the credit of the sinking fund, and the commissioners of the sinking fund shall annually, or oftener, apply the same to the redemption or purchase at a rate not above par and accrued interest) of the bonds issued under the foresaid acts, and the bonds so redeemed shall be cancelled by the said commissioners and the same registered by the second auditor in a book to be kept for that purpose, giving the number and date of issue, the character, the amount, and the owner at the time of purchase, of the bonds so redeemed and cancelled; and in case no such purchase of bonds can be made, then the amount which can be redeemed shall be called in by lot, as provided in section two of this act. All bonds of the state issued under the provisions of the act aforesaid, approved February fourteenth, eighteen hundred and eighty-two, and now held by said commissioners of the sinking fund, shall, as soon as at least fifteen million of dollars of new bonds shall have been issued and delivered pursuant to the provisions of this act, be cancelled by said commissioners and preserved in the office of the treasurer of the commonwealth.

11. Executors, administrators and others acting as fiduciaries may participate in the settlement of the debt herein specified in the man-

ner hereinbefore provided, and such action shall be deemed a lawful investment of their trust fund. Executors, administrators and others acting as fiduciaries may invest in the bonds issued under this act, and the same shall be considered a lawful investment.

57 12. All coupons heretofore tendered for taxes and held by said tax-payers in pursuance of such tender, shall be received in payment of the taxes for which they were tendered, and upon their delivery to the proper collector or the amount thereof in money, the judgments obtained against the said tax-payers for such taxes shall be marked satisfied: provided the said tax payers shall have paid in money and not in coupons the costs of said judgments. All coupons heretofore tendered for taxes and held by the officers of the commonwealth for verification, in pursuance of the statute in such case made and provided, shall be received in payment of the taxes for which they were tendered, and the money collected for such taxes returned to the parties from whom it was received: Provided the said tax-payers shall have paid in money, and not in coupons, all costs incurred in legal proceedings to verify said coupons.

13. The treasurer of the commonwealth is authorized and directed to pay the interest on the bonds issued under this act as the same shall become due and payable out of any money in the treasury not otherwise appropriated.

14. The plates from which the bonds and fractional certificates authorized by this act are printed shall be the property of the commonwealth.

15. All necessary expenses incurred in the execution of this act shall be paid out of any money in the treasury not otherwise appropriated on the warrants of the auditor of public accounts, drawn upon the treasury on the order of the commissioners of the sinking fund.

16. The act entitled "an act to ascertain and declare Virginia's equitable share of the debt created before and actually existing at the time of the partition of her territory and resources, and to provide for the issuance of bonds covering the same, and the regular and prompt payment of interest thereon," approved February four-

58 teenth, eighteen hundred and eighty-two, and the amendments thereto- to-wit: an act entitled "an act to declare the true intent and meaning of, and to amend and re-enact section five of chapter eighty-four of acts eighteen hundred and eighty-one and eighteen hundred and eighty-two, approved February fourteenth, eighteen hundred and eighty-two," approved August twenty-seventh, eighteen hundred and eighty-four; and the act entitled "an act to amend and re-enact an act approved August twenty-seventh, eighteen hundred and eighty-four, entitled an act to declare the true intent and meaning of, and to amend and re-enact section five of chapter eighty-four of acts of eighteen hundred and eighty-one and eighteen hundred and eighty-two, approved February fourteenth, eighteen hundred and eighty-two," approved November twenty-ninth, eighteen hundred and eighty-four, are hereby repealed.

17. The commissioners of the sinking fund are authorized, if it

shall seem to them for the best interest of the commonwealth, to make one extension of the time for the funding of the said twenty-eight million of dollars of outstanding evidences of debt for a period not exceeding six months from the thirtieth day of June, eighteen hundred and ninety-two.

18. The commissioners of the sinking fund are authorized to exchange coupon bonds issued under this act into registered bonds in the denominations hereinbefore provided, and to arrange for the transfer of registered bonds. For every bond so issued in exchange a fee of fifty cents shall be charged by, and paid to the second auditor, and shall, upon his order, be covered into the treasury to the credit of the sinking fund; and bonds so taken in exchange shall be cancelled in the manner hereinbefore prescribed.

19. This act shall be in force from its passage.

59

EXHIBIT NUMBER 5.

CHAP. 747. A joint resolution to provide for adjusting with the State of West Virginia the proportion of the public debt of the original State of Virginia proper to be borne by West Virginia, for the application of whatever may be received from West Virginia to the payment of those found to be entitled to the same.

(Approved March 6, 1894.)

(Acts G. A. of Va., 1893-4, p. 867.)

Whereas the general assembly of Virginia is required by the constitution of Virginia to provide by law for adjusting with the state of West Virginia the proportion of the public debt of the original state of Virginia proper to be borne by West Virginia; and

Whereas the general assembly has heretofore passed four several acts in relation to the funding and settlement of her public debt, as follows, to-wit:

First. An act entitled an act to provide for the funding and payment of the public debt, approved March thirtieth, eighteen hundred and seventy-one.

Second. An act entitled an act to provide a plan of settlement of the public debt, approved March twenty-eight, eighteen hundred and seventy-nine.

Third. An act entitled an act to ascertain and declare Virginia's equitable share of the debt created before and actually existing at the time of the partition of her territory and resources, and to provide for the issuance of bonds covering the same and the regular and prompt payment of interest thereon, approved February fourteenth, eighteen hundred and eighty-two; and

Fourth. An act entitled an act to provide for the settlement of the public debt of Virginia not funded under the provisions of an act entitled an act to ascertain and declare Virginia's equitable share of the debt created before and actually existing at the time of the parti-

tion of her territory and resources, and to provide for the issuance of bonds covering the same and the regular and prompt payment of the interest thereon, approved February fourteenth, 60 eighteen hundred and eighty-two, approved February twentieth, eighteen hundred and ninety-two; and

Whereas in each of said acts provision is made for issuing to creditors of the original state of Virginia who should accept the new bonds provided for by said several acts, certificates for such proportion of the obligation surrendered by them as was deemed proper to be borne by the state of West Virginia, to-wit: one third of the amount of said obligations, of which certificates this state holds a large amount, through the agency of the commissioners of its sinking fund and literary fund; and

Whereas the present state of Virginia has settled and adjusted, to the entire satisfaction of her people and the creditors, the liability assumed by her on account of two-thirds of the debt of the original state; now, therefore,

Be it resolved by the senate of Virginia (the house of delegates concurring). That a commission of seven members is hereby created and provided for, of whom the present chairman of the committee on finance and banks of the senate shall be one, and the present chairman of the committee on finance of the house of delegates shall be another; of the other five, two shall be chosen by the senate from among the persons now members of that body; two by the house of delegates from among the persons now members of that body, and one, to be a resident of this state, shall be appointed by the governor. No member of said commission shall cease to be a member thereof by reason of ceasing to be a member of the general assembly.

Said commission shall choose its own chairman and secretary; vacancies therein occurring or existing during recess of the legislature shall be filled by the governor on notification thereof by the chairman; and a majority of said commission shall be competent to act.

Said commission is hereby authorized and directed to negotiate with the state of West Virginia a settlement and adjustment of the proportion of the public debt of the original state of Virginia 61 proper to be borne by West Virginia.

But said commission shall not proceed with said negotiation until assurances satisfactory to the commission shall have been received from the holders of a majority in amount of said certificates, exclusive of those held by the state through the agency of the board of education and sinking fund commissioners, that they desire the said commission to enter into and undertake such negotiation, and will accept the amount so ascertained to be paid by the state of West Virginia in full settlement of the one-third of the debt of the original state of Virginia which has not been assumed by the present state of Virginia. But said commission shall in no event enter into any negotiation hereunder except upon the basis that Virginia is bound only for the two-thirds of the debt of the original state which she has already provided for as her equitable proportion thereof.

All expenses incurred by said commission and said board of arbitrators, including reasonable compensation of the members thereof, shall be paid out of the proceeds of such settlement, or by the holders of said certificates who are the beneficiaries of such settlement, but without subjecting the state to any expense on this account.

And their action shall be subject to the approval or disapproval of the general assembly, and shall not be binding on the state until approved by the general assembly. The governor is requested to communicate this joint resolution to the governor and legislature of West Virginia.

This joint resolution shall be in force from its passage.

62

EXHIBIT NUMBER 6.

CHAP. 825. An act to provide for the settlement with West Virginia of the proportion of the public debt of the original State of Virginia proper to be borne by West Virginia, and for the due protection of the Commonwealth of Virginia in the premises.

Approved March 6, 1900.

(Acts G. A. of Va., 1899-1900, p. 902.)

Whereas the general assembly of Virginia has heretofore passed certain acts with respect to the settlement of her public debt as follows, to-wit:

First. An act entitled an act to provide for the funding and payment of the public debt, approved March thirtieth, eighteen hundred and seventy-one.

Second. An act entitled an act to provide a plan of settlement of the public debt, approved March twenty-eighth, eighteen hundred and seventy-nine.

Third. An act entitled an act to ascertain and declare Virginia's equitable share of the debt created before and actually existing at the time of the partition of her territory and resources, and to provide for the issuance of bonds covering the same and the regular and prompt payment of interest thereon, approved February fourteenth, eighteen hundred and eighty-two; and

Fourth. An act entitled an act to provide for the settlement of the public debt of Virginia not funded under the provisions of an act entitled an act to ascertain and declare Virginia's equitable share of the debt created before and actually existing at the time of the partition of her territory and resources, and to provide for the issuance of bonds covering the same and the regular and prompt payment of the interest thereon, approved February fourteenth, eighteen hundred and eighty-two, approved February twentieth, eighteen hundred and ninety-two; and

Whereas in each of said acts provision is made for issuing to creditors of the original state of Virginia who should accept
63 the new bonds provided for by said several acts, certificates

for such proportion of the obligation surrendered by them as was deemed proper to be borne by the state of West Virginia, to-wit: one-third of the amount of said obligations, of which certificate this state holds a large amount, through the agency of the commissioners of its sinking fund and literary fund; and

Whereas the general assembly is required by the constitution of Virginia to provide by law for adjusting with the state of West Virginia the proportion of the debt of the original state of Virginia proper to be borne by West Virginia, but no such adjustment has ever been had; and

Whereas it appears that while Virginia has satisfactorily settled the two-thirds of the original debt which she assumed, yet it is possible that complications will arise with respect to said certificate which will render it desirable that she should endeavor to secure an adjustment thereof upon terms which will protect herself, but will work no injustice to West Virginia, and thus finally dispose of the only question remaining unsettled in connection with said debt; now, therefore,

1. Be it enacted by the general assembly of Virginia, That the commission created and appointed under a joint resolution of this general assembly entitled a joint resolution to provide for adjusting with the state of West Virginia the proportion of the public debt of the original state of Virginia proper to be borne by West Virginia, for the application of whatever may be received from West Virginia to the payment of those found to be entitled to the same, approved March sixth, eighteen hundred and ninety-four, be, and said commission hereby is, authorized to receive and take upon deposit the certificates aforesaid or have the same otherwise placed or held on deposit subject to their control upon an agreement and contract on the part of the holders of said certificates that if the said commission will secure a settlement with West Virginia with respect to said certificates the said holders of said certificates so deposited will accept the amount realized on such settlement from West Virginia
64 on said certificate as a full settlement of all their claims thereunder.

2. If at least two-thirds in amount of the said certificates issued under the act of eighteen hundred and seventy-one, exclusive of those held by the state through the agency of the board of education and the sinking fund commissioners, and at least a majority in amount of all the other certificates aforesaid shall be so deposited or placed subject to the control of the said commission upon the agreement and contract aforesaid, then the said commission shall be authorized and empowered by and with the advice and approval of the attorney-general of Virginia to take such action and institute such proceedings on behalf of the state as may in the judgment of said commission and attorney-general be needful and proper to protect the interest of the state and bring about and carry into effect a settlement as aforesaid. All the expenses involved in connection with any of the matters aforesaid shall be borne by the certificate

holders, as provided in the joint resolution aforesaid, and the state shall not be subject to any expense on that account.

3. This act shall be in force from its passage.

65

EXHIBIT NUMBER 7.

Showing Amounts Paid Off Since January 1, 1861, or Assumed and Now Carried by Virginia on Account of the Old Debt of the Undivided State.

Amount of interest paid, as shown by the records of the Second Auditor's Office, from January 1st, 1861, to February 1st, 1906	\$35,551,642.82
Bonds heretofore paid off, taken up, and retired by Virginia to Sept. 30, 1905. See 2nd Auditor's Report for 1905, p. 21, and now held by Virginia	10,771,791.49(*)
New Bonds of Virginia issued for the portion of the unpaid debt funded and assumed by her— See Second Auditor's Report for 1905, p. 9 ...	25,537,820.00
	<hr/> \$71,861,253.31

(*) NOTE.—This sum of \$10,771,791.49 probably does not include some considerable amounts of ante bellum bonds of Virginia paid her by some of the Railroad Companies of the State, and by the Dismal Swamp Canal Company in payment for the share and interest of the State in such Companies or for property sold them by the State; nor does it include considerable amounts of said bonds received by the State from the sureties of certain Sheriffs—nor does the Statement include amounts paid by Virginia since 1861 in settlement of open accounts or unfounded ante bellum debts of the undivided State. These amounts can be ascertained from the records of the Board of Public Works, the First and Second Auditor's offices and the Acts of Assembly.

EXHIBIT No. 8.

66 Report of the Commission appointed and acting under the joint resolution of the General Assembly of Virginia, approved March 6th, 1894, and the act of the said General Assembly, approved March 6th, 1900, with respect to certain certificates issued by the State in connection with the debt of the original State of Virginia and known as Virginia Deferred Certificates.

RICHMOND, VA., January 9th, 1906.

To the General Assembly of Virginia:

Your Commission appointed and acting under the joint resolution of the General Assembly entitled "A joint resolution to provide for

adjusting with the State of West Virginia the proportion of the debt of the original State of Virginia proper to be borne by West Virginia for the application of whatever may be received from West Virginia to the payment of those found entitled to the same," approved March 6th, 1894, and an Act of the General Assembly entitled "An Act to provide for the settlement with West Virginia of the proportion of the public debt of the original State of Virginia proper to be borne by West Virginia, and for the due protection of the Commonwealth of Virginia in the premises," approved March 6th, 1900, beg leave to make a further report of their proceedings, as follows:

It will be noted that it appears from the first report of your Commission, dated January 28th, 1896, and printed as Senate Document No. 10 in the Senate Journal and Documents of 1896, and as House Document No. 4 in the House Journal and Documents of that session, that the conditions required by said joint resolution having been complied with, your Commission was ready and desirous to open negotiations with West Virginia for a settlement as provided for in said joint resolution, and this fact was communicated to the

67 Governor of West Virginia by the Governor of this State with the request that such negotiations might accordingly be opened, which communication was laid before the Legislature of West Virginia, but that body, by a joint resolution, declined to enter into negotiations on the subject.

By a subsequent report of your Commission to this General Assembly, dated February 7th, 1900, and to be found printed as Senate Document No. 6 in Senate Journal and Documents for the session of 1899-90, it was further shown that the control and disposal of a majority of said certificates had been again tendered your Commission by a Committee, of which John Crosby Brown of New York was chairman, acting under a depositing agreement of July 28th, 1898, and the said Committee offering to accept whatever might be realized from West Virginia on the certificates in full settlement of their claims. A copy of said depositing agreement of July 28th, 1898, under which said Committee was constituted, was filed with said last report, and the same is also now herewith filed, showing who constituted said Depositing Committee and what their powers and functions were, and also that Brown Brothers & Company, Bankers of New York, N. Y., were the depository of the said Committee in whose hands the said certificates had been placed.

Upon the coming in of this last report, the Act of March 6th, 1900, was passed by the General Assembly, by which the powers and duties of your Commission were very materially enlarged, and it was provided that if at least two-thirds of the certificates of 1871 outstanding in the hands of the public, and a majority of all the other certificates so outstanding, were deposited and placed subject to the control of your Commission upon the agreement that the creditors would accept whatever might be realized thereon from West Virginia in full settlement of their claims, then your com-

mission was authorized, by and with the advice and approval of the Attorney General of the State, to take such action and institute such proceedings on behalf of the State as might, in the
68 judgment of your Commission and the Attorney General, be needful and proper to protect the interests of the State and bring about and carry into effect a settlement in the premises, but all the expenses in connection with any of the matters involved were to be borne by the certificate holders. A copy of this Act is for convenience of reference herewith filed.

At the time of the passage of this Act the Depositing Committee did not hold the two-thirds in amount of the certificates of 1871, required by the Act as a basis for negotiations or action by your Commission, but having acquired them later, the Committee, on the 18th of September, 1902, submitted to your Commission a proposition in writing, bearing date on that day, by which they tendered and placed subject to the control of your Commission, in accordance with the terms of said Act, \$8,565,095.70 of the certificates of 1871, being more than the requisite two-thirds of these certificates outstanding, and \$1,782,475.13 of the other certificates outstanding, being a majority thereof, upon the agreement and arrangement on the part of your Commission acting for the State of Virginia that they would enter into negotiations with the State of West Virginia, or the constituted authorities thereof, for the purpose of effecting a settlement with that State with respect to said certificates, and that your commission would, by and with the advice and approval of the Attorney General, take such action as they might deem needful in the premises, any amount realized on such settlement to be accepted in full of all claims on said certificates as in said Act provided.

This proposition was accompanied by the statement of Brown Bros. & Co., the depository, showing that the certificates referred to were held by them, and it was stated in the proposition that upon its acceptance by your Commission it should constitute a contract
69 between the parties to continue in force for three years, but subject to renewal or extension by the parties, and to such amendment or modification as might be agreed on. It was on the day of its date accepted in writing by the unanimous action of your Commission, and the acceptance thereof duly endorsed thereon, and the same was approved by the Attorney General on September 29th, 1902; and a copy of the same showing its acceptance and the endorsements thereon is herewith filed and is referred to as showing in detail the action taken by your Commission. This agreement constitutes an arrangement with Virginia under said Act of March 6th, 1900, for obtaining a settlement with West Virginia and thus precluded the right which any certificate holder might, under the terms of the depositing agreement, otherwise have had to withdraw his certificate after October 1st, 1902.

On December 3rd, 1902, a plan of settlement as provided in the said depositing agreement of July 28th, 1898, was formulated, approved and recommended by the Depositing Committee and Advis-

ory Board created under said agreement, by which the provisions of the foregoing contract of September 18th, 1902, were adopted as included in their plan of settlement, with the right to the Depositing Committee to make such further contracts with the Virginia Commission as might be deemed needful to bring about a settlement with West Virginia under said joint resolution and Act of the Virginia Assembly.

This plan of settlement provided for a full compliance on the part of the Depositing Committee with the terms of said joint resolution and Act, and clothed the Committee with ample powers to act in the premises, and notice of it was duly published in New York and London, as required in the agreement of July 28th, 1898, so as to afford opportunity to any dissenting depositor of certificates to give notice of his unwillingness to accept the proposed settlement, which notice the agreement provided was to be given within thirty days from the completion of the publication, but no such notice appears to have been given at any time by any depositor. The depositing agreement also provided that in the absence of such notification from a majority of the depositors, the proposed plan should become effective and final, and that the declaration in writing of this fact by the Committee to the depository should be conclusive on this point; and such declaration in writing by the Depositing Committee to Messrs. Brown Bros. & Co., the depository, was accordingly so made in writing on December 13th, 1904. A copy of this plan of settlement and the certificates of the publication thereof, together with the said declaration in writing of the Committee, are all herewith filed and are referred to as parts hereof.

On December 14th, 1904, the amount of said certificates deposited with Brown Brothers and Company, as aforesaid, had increased to \$11,607,298.64, of which \$9,360,062.96 were those of 1871, and your Commission proposing to again attempt to open negotiations for a settlement with the legislature of West Virginia (which was then about to convene) it was thought advisable to enter into a contract by way of amendment to that of September 18th, 1902, by which the complete control of all these certificates should be placed in the hands of your Commission, and such additional agreement, bearing date December 14th, 1904, was accordingly entered into between the said Depositing Committee and your Commission, and approved by the Attorney General; and contemporaneously therewith by a receipt or certificate bearing date on the same day, the said Brown Brothers and Company acknowledged and certified that they held all the certificates last aforesaid to the amount of \$11,607,298.64 on deposit for and subject to the control and disposition of your Commission without reservation or condition of any kind.

A copy of this agreement and receipt of December 14th, 1904, together with the Attorney General's approval, will be found filed herewith. By a subsequent communication of January 23rd, 1905, from Brown Bros. & Company to your Com-

mission, it was shown that said deposits, so placed under the control of your Commission, had increased to \$12,910,555.89, of which \$10,639,776.42 were those of 1871, and a copy of this communication will also be found herewith filed.

Desiring, as above stated, to open communication with West Virginia, your Commission, on December 14th, 1904, appointed a sub-committee consisting of Messrs. Randolph Harrison, Chairman, H. D. Flood, H. H. Downing and John B. Moon, who, together with the Attorney General, should be authorized to open negotiations with the proper authorities of West Virginia looking to a settlement of the matters at issue. This sub-committee endeavored to do this by the presentation of a memorial to His Excellency, A. B. White, Governor of the State of West Virginia, signed by the sub-committee and approved by the Attorney General, bearing date January 25th, 1905, a copy of which is herewith filed. This memorial was presented to the Governor of West Virginia at Charleston, W. Va., by the Attorney General and the chairman of the sub-committee, and was by him, on the 27th day of January, 1905, transmitted to the Senate of West Virginia by a special message to that body, but without any recommendation on his part, a copy of which message is also herewith filed.

It was arranged, however, by the Senate and House Committees on Finance of the West Virginia Legislature to give to the sub-committee a hearing upon the subject at Charleston on February 1st, 1905, at which hearing the Attorney General of Virginia, the chairman of the sub-committee and the chairman of your Commission attended, and the memorial of your Commission above referred to was read, and a full presentation was made by Mr. Harrison, chairman of the sub-committee, of the reasons why West Virginia should, at least, enter into negotiations in regard to a settlement in an address made by him to the Senate and House Finance
72 Committees aforesaid. It was considered by your Commission that Mr. Harrison's address dealt with the questions involved in so clear and able a manner and showed so conclusively that it was both the right and duty of Virginia to ask for a settlement, that they caused it to be printed, and a copy of it is herewith filed.

The Legislature of West Virginia, however, failed and declined to enter into any negotiations or to empower any committee or other official to do so, but on the contrary passed the following resolutions: "Resolved by the Legislature of West Virginia: That it is the sense of this Legislature that the State of West Virginia does not owe any part of the so called debt of Virginia, and that this Legislature is opposed to any negotiations whatsoever on that subject." Indeed your Commission are advised that resolutions of a similar import have been passed by all, or nearly all, of the Legislatures of West Virginia which have met since your Commission first communicated with them on the subject in 1896, thus showing a persistent and determined refusal on the part of West Virginia

to pay any portion of what they are bound for on account of the debt of the original State, or to enter into any accounting or negotiations whatsoever on the subject.

The deferred certificates of 1871 issued by the State of Virginia are in the following form:

"Copy of Certificate under Act of March 30, 1871.

"COMMONWEALTH OF VIRGINIA.

"No. —.

"TREASURER'S OFFICE, RICHMOND, VA.

"This is to certify that there is due unto — — heirs, executors, administrators or assigns \$—, being one-third of bond surrendered under the provisions of an Act approved March 30th, 1871, entitled, 'An Act to provide for the funding and payment of the public debt,' namely, Bond No. —, with interest, amounting to \$—. Payment of said one-third with interest thereon at the rate of six per cent. per annum will be provided for in accordance with such settlement as shall hereafter be had between the States of Virginia and West Virginia in regard to the public debt of the State of Virginia existing at the time of its dismemberment, and the State of Virginia holds said bonds so far as unfunded in trust for the holder hereof or his assigns.

"In testimony whereof this certificate has been signed by the Treasurer and countersigned by the Second Auditor, as provided by law.

"———"

"Treasurer of the Commonwealth of Virginia.

"———"

"Second Auditor of Virginia."

So it would appear that if the contention of West Virginia is correct; the responsibility that attaches to the issuing of these certificates must rest with Virginia alone and West Virginia be responsible for nothing in connection with the debt of the original State.

By a recent enactment of the State of South Dakota suit was authorized against any state whose over-due bonds might be donated or deposited in her treasury, and under this law a suit was brought by the South Dakota and judgment given against North Carolina in the Supreme Court of the United States upon some past due bonds of the latter state as see the case of South Dakota *vs.* North Carolina, 192 U. S. Reports, 286,—and a like statute has lately been enacted by the State of New York authorizing similar suits. Your Commission are informed that such suits have lately been proposed against the State of Virginia under these statutes upon the certificates of 1871 and have only been restrained and prevented

74 by the prospect of some definite action on the part of Virginia.

So your Commission were confronted with the alternative of

either a suit by Virginia as plaintiff on these certificates with indemnity to her against liability as proposed by the Depositing Committee, or a suit against her without any such indemnity, and your Commission had no doubt as to the safe and proper course to pursue, especially as Virginia herself holds through the agency of her Sinking and Literary funds \$2,578,518.68 of the certificates of 1871 and \$166,943.33 of the certificates of other classes which would be entitled to their distributive share in whatever may be realized from West Virginia.

The contract of December 14th, 1904, would have expired by limitation on September 18th, 1905, but in order to allow time for the drawing of a final contract, the same was by an agreement endorsed thereon on September 9th, 1905, extended to December 1st, 1905; and on the 24th day of November, 1905, a final contract was drawn up and entered into between your Commission and the Depositing Committee. This last contract was annexed to that of December 14th, 1905, as an extension and enlargement thereof, it having been provided in all of said contracts that they might be extended, modified and changed by the act of the parties.

A copy of said last contract of November 24th, 1905, annexed to that of December 14th, 1904, together with the extensions aforesaid and the approval of the Attorney General thereon endorsed, are herewith filed. It will be seen from said last contract that the reasons are therein set forth which led the Commission to the conclusion that no alternative remained in the premises except a suit against West Virginia; and they accordingly by and with the advice and approval of the Attorney General undertook to bring such suit

and the Depositing Committee agreed as provided in said Act
75 of March 6th, 1900, to accept the amount recovered in such suit or the adjudication therein or any amount realized by your Commission on a compromise with West Virginia in full of all claims on the certificates deposited.

This contract also further provides that all certificates thereafter deposited with Brown Brothers and Company should be included thereunder, and that your Commission should have complete control of all certificates so deposited; and a further and additional receipt or statement was accordingly given your Commission by Brown Brothers and Company bearing date January 4th, 1906, showing that since their statement and receipt of December 4th, 1904, additional certificates to the amount of \$1,566,136.77, of which \$1,491,231.13 were those of 1871, had been deposited with them and were subject to the control and disposal of your Commission, making total deposits to that date \$13,173,435.31, of which \$10,851,294.09 were those of 1871. This last statement was verified by the oath of William Gerard Vermilye, cashier of Brown Brothers and Company, attached thereto; and on January 5th, 1906, your Commission caused all of these certificates to be removed from the custody of Brown Brothers and Company and placed on deposit for your Commission and subject to their order with the Central Trust

Company of New York, N. Y., whose acknowledgment of the receipt thereof stated that the certificates were held on deposit for and subject to the order, control and disposal of your Commission, and the keys to the boxes containing said certificates were delivered to the Secretary of your Commission—Copies of this last named statement of Brown Brothers and Company, with the affidavit of the said Vermilye attached, and of the receipt and acknowledgment of the Central Trust Company are herewith returned.

Your Commission caused these certificates to be removed from Brown Brothers and Company, not from any want of confidence in them, because your Commission have every reason to believe 76 them to be entirely responsible, but because it was deemed best to place the certificates in the hands of some custodian who never had any connection with the Depositing Committee, and who would be responsible to your Commission alone in connection therewith.

To recapitulate, your Commission will say that the whole amount of the deferred certificates outstanding is \$18,227,153.60, as shown in the statement of the Second Auditor, John G. Dew, dated September 17, 1902, and herewith returned, which statement shows also the different classes of certificates.

Of the certificates of 1871, there are in all \$15,281,970.47, of which \$2,578,518.68 are held by the State through the Sinking and Literary funds, leaving outstanding in the hands of the public \$12,703,451.79; and of this last amount there have been deposited with your Commission \$10,851,294.09, as above stated.

Of the other certificates there are in all \$2,845,183.13, of which the Literary Fund holds \$166,943.33, leaving in the hands of the public \$2,778,239.80, and of this last amount there have been deposited with your Commission \$2,322,141.32 as above stated.

It thus appears that your Commission hold more than five-sixths of all the certificates of 1871 outstanding, and about six-sevenths of all the others outstanding.

It will be noted that since the first agreement of Sept. 18, 1902, was entered into the certificates deposited with Brown Brothers and Company have increased from \$10,347,570.83 to \$13,173,435.41, which are now in the hands of your Commission; and there is reason to believe that this amount will be still further increased upon the institution of the proposed suits.

Respectfully submitted.

JOHN B. MOON.
J. THOMPSON BROWN.
H. T. WICKHAM.
H. D. FLOOD.
H. H. DOWNING.
RANDOLPH HARRISON.
W. F. RHEA.

77

Attest: JOS. BUTTON, *Secretary*.

AGREEMENT.

78 This agreement between John Crosby Brown, George Coppel, J. Kennedy Tod and Clarence Cary, herein styled "The Committee," parties of the first part, and such holders of the certificates herein mentioned as deposit hereunder, parties of the second part.

Whereas, the present State of Virginia enacted laws providing for issuing certificates for one-third of the debt of the original State, and more than \$12,000,000 of such certificates recite:

"That payment will be provided for in accordance with such settlement as shall hereafter be had between the States of Virginia and West Virginia in regard to the public debt of Virginia existing at the time of its dismemberment."

And Whereas, it is believed that West Virginia's proportion of said debt, if ascertained as provided by the Ordinance under which Virginia was divided, is less than the amount of the certificates which have been issued by Virginia; and it is considered that, under such circumstances, neither State should, or will, incur any obligations respecting said debt unless its legislature has an undoubted guarantee that substantially all of the certificates will be promptly surrendered in exchange for whatever amount West Virginia agrees to pay and the creditors of West Virginia may agree to accept.

Witnesseth:

1st. The following gentlemen shall constitute an Advisory Board in this behalf, to-wit: Thomas F. Bayard, W. Pinkney Whyte, Edward J. Phelps and George G. Williams.

The function of said Board is to examine such plan of settlement as may be proposed by the Committee, representing the holders of the certificates, and submitted to them in accordance with this agreement, and to state their recommendation thereof of the contrary.

Said board may add to their number, and any vacancy
79 may be filled by the remaining members.

2d. The function of the Committee is:

(a.) To bring about the deposit, under this agreement, as far as may be practicable, of said certificates, or of the trust receipts heretofore issued to represent them.

(b.) To formulate a plan of settlement, and after it has been recommended by the Advisory Board, cause the same to be published and submitted to depositing creditors for their acceptance as herein provided.

(c.) To act as agent of the depositing creditors in carrying out the purposes of this agreement.

(d.) The Committee shall appoint one or more depositories to receive said certificates or trust receipts, and issue therefor its proper receipt.

Subject to the restrictions herein, the Committee shall have power to perform any act to accomplish a settlement, and this includes

power to make arrangements with either Virginia or West Virginia to insure the prompt surrender of all or any of the certificates in exchange for such amount as West Virginia may pay and her creditors agree to accept, and also includes power to execute, in behalf of the depositing creditors, any release or acquittance which will exclude any demand on Virginia beyond the amount she may receive from West Virginia; provided that no settlement shall be concluded until it has been recommended by the Advisory Board, and has also been submitted to creditors and accepted as follows, to-wit:

(1.) As soon as a plan of settlement has been recommended by the Advisory Board, the Committee shall, before proposing it to the State, advertise for at least twice a week for three weeks in
80 two of the newspapers published in New York City and London, that a plan of settlement has been formulated, and notifying parties in interest where said plan may be obtained in said cities without cost.

(2.) If within thirty days after the first publication of said advertisement holders of a majority of the face value of the deposited certificates notify the Committee, in writing, either directly or through any depository, of their unwillingness to accept the proposed settlement, then said settlement shall not be consummated. If the Committee is not so notified within said thirty days, then it shall be assumed that the proposed plan, being satisfactory to a majority, is accepted by all the depositing creditors, and it shall be offered to said States or either of them to be carried into effect by appropriate legislation.

(3.) After a plan of settlement has become effective (of which fact the declaration in writing of the Committee to the several depositories shall be conclusive), each depository shall, in the manner directed by the Committee, surrender to either State, as may be necessary, any or all of the certificates deposited with it, and receive in exchange therefor the amount or kinds of securities called for by the plan of settlement.

The amount so received in settlement shall be immediately delivered to depositing creditors, in accordance with the terms of settlement.

The Committee may arrange for the purchase and sale of such fractional interests as may be necessary to equalize distribution.

(4.) Each depositor shall, when he receives his new bonds, in settlement, pay to the depository, for account of the Committee, such
81 a commission as the Committee may assess for the charges and expenses of settlement, including the compensation of the Committee, Counsel and Advisory Board, but such assessment shall in no event exceed five per cent, in cash on the par of any certificate deposited under this agreement.

If the Committee decide at any time that a settlement satisfactory to holders cannot be promptly effected, they may publish a notice requiring holders to pay so much of twenty cents per \$100 of certificates as may be necessary to reimburse the expenses actually in-

curred by the Committee. Any certificate, assessment on which is not paid within six months after such notice has been published twice a week for three consecutive weeks in two of the newspapers in New York and London, may be sold by the Depository and the proceeds, after paying its assessment, held for the holder of its corresponding receipt.

Any certificate may be withdrawn from deposit at any time after October 1, 1902, upon payment of its pro rata of expenses, not to exceed twenty cents per \$100 of certificates, unless a settlement has been previously arranged, or unless an arrangement has been made with Virginia for obtaining a settlement with West Virginia.

(5.) The Committee may add to their number, and any vacancy may be filled by the remaining members. By unanimous consent of the members of the Committee any member may act by proxy.

In testimony whereof, the Committee have hereto set their hands this 28th day of July, 1898.

82 An act to provide for the settlement with West Virginia of the portion of the public debt of the original State of Virginia properly to be borne by West Virginia, and for the due protection of the Commonwealth of Virginia in the premises.

Approved March 6th, 1900.

Whereas the General Assembly of Virginia has heretofore passed certain acts with respect to the settlement of her public debt as follows, to-wit:

First. An act entitled an act to provide for the funding and payment of the public debt, approved March thirtieth, eighteen hundred and seventy-one.

Second. An act entitled an act to provide a plan of settlement of the public debt, approved March twenty-eighth, eighteen hundred and seventy-nine.

Third. An act entitled an act to ascertain and declare Virginia's equitable share of the debt created before and actually existing at the time of the partition of her territory and resources, and to provide for the issuance of bonds covering the same and the regular and prompt payment of interest thereon, approved February fourteenth, eighteen hundred and eighty-two; and

Fourth. An act entitled an act to provide for the settlement of the public debt of Virginia not funded under the provisions of an act entitled an act to ascertain and declare Virginia's equitable share of the debt created before and actually existing at the time of the partition of her territory and resources, and to provide for the issuance of bonds covering the same and the regular and prompt payment of the interest thereon, approved February fourteenth, eighteen hundred and eighty-two, approved February twentieth, eighteen hundred and ninety-two; and

Whereas in each of said acts provision is made for issuing to
creditors of the original State of Virginia who should accept
83 the new bonds provided for by said several acts, certificates

for such proportion of the obligation—surrendered by them as was deemed proper to be borne by the State of West Virginia—to-wit: one-third of the amount of said obligations, of which certificates this State holds a large amount, through the agency of the commissioners of its sinking fund and literary fund; and

Whereas the General Assembly is required by the constitution of Virginia to provide by law for adjusting with the State of West Virginia the proportion of the debt of the original State of Virginia properly to be borne by West Virginia, but no such adjustment has ever been had; and

Whereas it appears that while Virginia has satisfactorily settled the two-thirds of the original debt which she assumed, yet it is possible that complications will arise with respect to said certificates which will render it desirable that she should endeavor to secure an adjustment thereof upon terms which will protect herself, but will work no injustice to West Virginia, and thus finally dispose of the only question remaining unsettled in connection with said debt; now, therefore,

1. Be it enacted by the General Assembly of Virginia, That the commission created and appointed under a joint resolution of this General Assembly entitled a joint resolution to provide for adjusting with the State of West Virginia the proportion of the public debt of the original State of Virginia properly to be borne by West Virginia, for the application of whatever may be received from West Virginia to the payment of those found to be entitled to the same, approved March sixth, eighteen hundred and ninety-four, be, and said commission hereby, is authorized to receive and take upon deposit the certificates aforesaid or have the same otherwise placed or held on deposit subject to their control upon an agreement and contract on the part of the holders of said certificates
84 that if the said commission will secure a settlement with West Virginia with respect to said certificates the said holders of said certificates so deposited will accept the amount realized on such settlement from West Virginia on said certificates as a full settlement of all their claims thereunder.

2. If at least two-thirds in amount of the said certificates issued under the act of eighteen hundred and seventy-one, exclusive of those held by the state through the agency of the board of education and the sinking fund commissioners, and at least a majority in amount of all the other certificates aforesaid shall be so deposited or placed subject to the control of the said commission upon the agreement and contract aforesaid, then the said commission shall be authorized and empowered by and with the advice and approval of the attorney-general of Virginia to take such action and institute such proceedings on behalf of the state as may in the judgment of said commission and attorney-general be needful and proper to protect the interests of the state and bring about and carry into effect a settlement as aforesaid. All the expenses involved in connection with any of the matters aforesaid shall be borne by the certificate

holders, as provided in the joint resolution aforesaid, and the state shall not be subjected to any expense on that account.

3. This act shall be in force from its passage.

85

Proposal.

To the Virginia Commission as constituted under a joint resolution of the General Assembly of Virginia approved March 6, 1894, and the act of the said General Assembly approved March 6, 1900:

Whereas your Commission was constituted as set forth in said joint resolution and act of Assembly for the purpose of negotiating and bringing about a settlement with the State of West Virginia with respect to the proportion of the public debt of the original State of Virginia proper to be borne by West Virginia and in connection with which the present State of Virginia has issued certain certificates under four acts of its General Assembly, approved, respectively March 30th, 1871, March 28th, 1879, February 14th, 1882, and February 20th, 1892.

And whereas your commission was, under the said act of March 6, 1900, further authorized to receive and take upon deposit the certificates aforesaid, or to have the same otherwise placed or held on deposit subject to your control, upon the agreement and contract on the part of the holders of said certificates that if your commission would secure a settlement with West Virginia with respect to said certificates, the said holders of said certificates, so deposited, would accept the amount realized on such settlement from West Virginia as a full settlement of all their claims thereunder; and said act further provided that if at least two-thirds of the amount of the said certificates issued under said act of 1871, (exclusive of those held by the State through the agency of the Board of Education and the sinking fund commissioners) and at least a majority in amount of all the other certificates should be so deposited or placed

subject to the control of your commission upon the agreement and contract aforesaid, then your commission should
86 be authorized, by and with the approval of the Attorney-General of Virginia, to take action in the premises as might be needful to protect the interest of the State and bring about and carry into effect a settlement as aforesaid.

And whereas by a certain agreement of July 28th, 1898, a committee on behalf of the holders of the said certificates was constituted to bring about the deposit, as far as practicable, of said certificates in such depository as the committee should appoint with powers in the committee to act as agent of the certificate holders so depositing in bringing about a settlement of their claims upon such plan, as might be recommended by the Advisory Board named in said agreement and as should become effective thereunder; it being further stated in said agreement that all the said certificates so deposited would be promptly surrendered in exchange for whatever

amount West Virginia might agree to pay and the creditors of West Virginia might agree to accept as aforesaid.

And whereas more than two-thirds in amount of all the said certificates of 1871, outstanding as aforesaid, to-wit, \$8,565,095.70 and a majority of all the other certificates aforesaid, to-wit, \$1,782,475.13, have been duly deposited with said committee and are in custody of Brown Brothers & Company, Bankers of New York City, N. Y., the depository named by said Committee, and are held subject to the control of the said committee under the said agreement, so that the same can be duly placed and held subject to the control of your commission in accordance with the said agreement and in pursuance of such plan of settlement as is now proposed or as may hereafter become effective.

In view of the premises the undersigned, the committee aforesaid, do now hereby tender and place subject to the control of your commission all the aforesaid certificates, so held on deposit, upon the agreement and arrangement on the part of your commission,
87 acting for the State of Virginia under the said joint resolution and act of Assembly aforesaid, that your commission will enter into negotiations with the State of West Virginia or the constituted authorities thereof for the purpose of effecting a settlement with West Virginia with respect—the said certificates in accordance with the said agreement of July 28th, 1898, and in accordance with such plan of settlement as is now proposed or as may hereafter become effective; and that your commission will by and with the advice and approval of the said Attorney-General take such action as they may deem needful in the premises; and in event such a settlement is so made, then it is hereby agreed that the amount realized thereon shall be accepted in full satisfaction of all the claims of the certificate holders thereunder and the undersigned Committee will surrender to your commission, in exchange for such amount the certificates aforesaid so deposited.

If this proposal be accepted by your commission, the same shall constitute an arrangement and contract with the State of Virginia for obtaining a settlement with West Virginia and the same shall continue binding upon the undersigned committee and upon the holders of said certificates so deposited for the period of three years next ensuing from the date hereof for the purpose of allowing time for a settlement aforesaid; and the same shall be subject to renewal and extension for such further time as may be agreed upon and to such modification and amendment as may be agreed upon, and shall apply to and include any and all such certificates as aforesaid as may hereafter be deposited with and held by the said Committee under said agreement of July 28th, 1898.

Respectfully submitted,

JOHN CROSBY BROWN, *Chairman.*

ROBERT L. HARRISON, *Secretary.*

Richmond, Va., September 18th, 1902.

88 The undersigned, Brown Brothers & Company, Bankers of New York City, N. Y., the depository referred to in the foregoing proposal, do hereby certify that they now hold as such depository and subject to the control of the Committee therein referred to, the certificates which are referred to in the foregoing proposal as being deposited with them, to-wit:

\$8,565,095.70	certificates of	1871
1,782,475.15	"	1879
		1882
		1892

September 18th, 1902.

BROWN BROTHERS & CO.

In pursuance of a resolution of the Virginia Commission this day unanimously adopted, the foregoing proposition of the Certificate holders Committee is hereby accepted by the said Commission and becomes an agreement between the said Committee and the said Commission.

JOHN B. MOON,

Chairman of the Virginia Commission.

Attest:

JOS. BUTTON, *Secretary.*

Richmond, Va., Sept. 18th, 1902.

The above action of the Virginia Debt Commission is approved Sept. 29th, 1902.

WILLIAM A. ANDERSON,

Attorney General of Virginia.

89 *Plan for the Settlement of the West Virginia Debt.*

Under an agreement of July, 1898, a Committee was constituted for the purpose of assembling the Virginia deferred certificates, with certain powers and functions as in the agreement specified, and by the same agreement an Advisory Board was constituted whose functions were also specified in the agreement.

In pursuance of this agreement, a certain plan of settlement was, on the 21st day of June, 1899, formulated and recommended by the Committee and Advisory Board, which among other things, contained the following provision:

"The Committee may surrender to either State (Virginia or West Virginia) any of the deposited certificates and receive in full satisfaction therefor their pro rata of such an amount in State Bonds, or cash as may be agreed upon between the Committee and the representatives of Virginia or West Virginia, as the maximum amount which West Virginia will assume on account of her proportion of the debt of the original State."

Since the date last named the General Assembly of Virginia, on the 6th day of March, 1900, passed an Act authorizing a commission

which had been appointed and constituted on her behalf in the premises, by and with the advice and approval of her Attorney General, to take such action and institute such proceedings as might, in the judgment of the Commission and Attorney-General, be needful and proper to bring about and carry into effect a settlement of said certificates; but it was further provided in this Act that such action should be taken only in the event that at least two-thirds of all the certificates of 1871 (exclusive of those held by the State) and a majority of all the other certificates, should be deposited with or placed subject to the control of the Commission upon an agreement on the part of the holders of such certificates that if the Commission would secure a settlement with West Virginia with respect to said certificates, they would accept the amount realized from West Virginia on such settlement in full of all their claims thereunder.

90 On the 18th of September, 1902, the Committee held on deposit \$8,565,095.70 of the certificates of 1871, being more than two-thirds thereof, (*) as above stated, and \$1,782,457.13 of all the other certificates, being a majority thereof; and the Committee accordingly on that day entered into a contract with the Virginia Commission, by which it was stipulated that the said certificates should, for the period of three years, be held subject to the control of the Commission upon the agreement and arrangement on the part of the Commission that they would enter into negotiations with the state of West Virginia for the purpose of effecting a settlement with respect to said certificates, and would by and with the advice and approval of said Attorney-General, take such action as they might deem needful in the premises; the amount realized on such settlement to be accepted in full of said certificates as above stated, which contract was duly approved by the Attorney-General of Virginia on September 29th, 1902.

In view of this Act of the Virginia Assembly, and of the recent action taken thereunder, it is deemed desirable to make the plan of settlement heretofore recommended, more definite with respect to the matters now involved; and to this end the following is hereby formulated, approved and recommended by the Committee and the Advisory Board by way of supplement and addition to the original plan:

I. The above named Committee shall pledge or deposit the certificates now or hereafter received under the agreement of July 28, 1898, with the Virginia Commission, in conformity with the Act of March 6, 1900, for the purpose of taking such action and instituting such proceedings, by and with the advice and approval of the Attorney-General of Virginia as may be deemed needful to bring about and carry into effect a settlement as in said Act provided; such pledge or deposit to be for such length of time as may be agreed on;

(*) On March 2nd the figures were \$9,231,602.13 of the certificates of 1871 and \$2,239,451.62 of all the other certificates.

and the said agreement of September 18, 1902, shall continue in force for the period therein specified; and the Committee may enter into such further agreements with the said Commission as may be deemed needful to bring about a settlement in the premises.

91 II. In the event that no settlement shall be effected by the Virginia Commission either under the agreement of September 18, 1902, within the period therein specified, or under any other agreement which may be entered into between the Committee and the said Commission within such time as may be limited therein, the Committee may, after any and all such agreements with the said Commission shall have expired, take such other and further proceedings and make such other and further agreements and settlement in the premises as the Committee may deem judicious.

III. The Committee shall be authorized to make such disposition by pledge, sale or otherwise, of the certificates, now or hereafter deposited, under the agreement of July 28, 1898, as may be necessary to carry into effect any proceedings taken and any agreements or settlements made by them as above stated, with or through the said Commission or otherwise, or for the payment of expenses now or hereafter to be incurred, whether a settlement is effected or not, not to exceed, however, the limit fixed by said agreement, and may give such release and acquittance as may be necessary to that end.

IV. The amount realized on or the proceeds of any such settlement, after deducting proper charges under the agreement of July 28, 1898, shall be apportioned and distributed among the different certificate holders in such manner and according to such percentages as may be ascertained and established for the different classes of certificates by a tribunal to be constituted as follows *as follows*: one member thereof to be appointed by the Committee, one member by the Advisory Board, and the third by the two so appointed; and if it be impracticable in the judgment of such tribunal to distribute in kind any bonds or securities which may be received in any such settlement, then the same may be sold and converted into money for the purposes of such distribution. If a vacancy occur in such tribunal the same shall be filled by the remaining members.

New York, December 3d, 1902.

G. WILLIAMS,
M. PINKNEY WHYTE,
WAYNE MACVEAGH,
LYMAN J. GAGE,

Advisory Board.

JOHN CROSBY BROWN,

Chairman Committee.

92 The following are the affidavits showing publication in two newspapers in London and New York on the notice given under Article 2 of the Agreement of July 28, 1898:

STATE OF NEW YORK, *City and County of New York, ss:*

Thomas Mulhearn being duly sworn, says he is Principal Clerk of the Publisher of the Mail and Express, a daily newspaper published in the city of New York; and that the notice, of which the annexed is a printed copy has been regularly published in the said Mail and Express six times to-wit: January 13th, 16th, 20th, 23d, 27th and 30th, 1903.

THOMAS MULHEARN.

Sworn before me this 25th day of February, 1903.

R. E. A. DON, JR.,

Notary Public, City and County of New York.

To depositors of "West Virginia deferred certificates" under agreement of deposit, dated the 28th day of July, 1898:

NOTICE is hereby given, pursuant to Article 2, paragraph d, Section 1 of the said agreement, that a plan of settlement of the public debt of West Virginia has been formulated and has been approved of by the Advisory Board appointed under said agreement and all parties in interest are notified that the plan may be obtained, without cost in the city of New York, at the office of Messrs. Brown Brothers & Company, 59 Wall Street, and in the city of London, England, at the office of Messrs. Brown, Shipley & Company, Founders Court, Lothbury, E. C. and 123 Pall Mall, W.

Dated New York, January 13th, 1903.

JOHN CROSBY BROWN, *Chairman.*

CLARENCE CARY,

J. KENNEDY TOD,

BARTLETT JOHNSTON,

VIRGINIUS NEWTON,

R. P. CHEW,

Committee.

ROBERT L. HARRISON, *Secretary.*

93 STATE OF NEW YORK, *City and County of New York, ss:*

Theodore L. Peverelly, being duly sworn saith that he is the Principal Clerk of the Publisher of the New York Times, a daily newspaper printed and published in the city and County of New York; that the advertisement hereto annexed has been regularly published in the said New York Times six times to-wit: on January 14, 17, 21, 24, 28, 31st, 1903.

THEODORE L. PEVERELLY.

Sworn to before me this Feb. 25th, 1903.

[SEAL.]

EUGENE C. MAUBORGNE,

Notary Public, New York County.

To depositors of "West Virginia deferred certificates" under agreement of deposit, dated the 28th day of July, 1898:

NOTICE is hereby given, pursuant to Article 2, paragraph d, Section 1 of the said agreement, that a plan of settlement of the public debt of West Virginia has been formulated and has been approved of by the Advisory Board, appointed under said agreement, and all parties in interest are notified that the plan may be obtained, without cost in the City of New York at the offices of Messrs. Brown Brothers and Company, 59 Wall Street, and in the City of London, England, at the office of Messrs. Brown, Shipley and Company, Founders Court, Lothbury E. C. and 123 Pall Mall, W.

Dated New York, January 13th, 1903.

JOHN CROSBY BROWN, *Chairman*,
CLARENCE CARY,
J. KENNEDY TOD,
BARTLETT S. JOHNSTON,
VIRGINIUS NEWTON,
R. P. CHEW,

Committee.

ROBERT L. HARRISON, *Secretary*.

94

(Copy.)

KINGDOM OF GREAT BRITAIN AND IRELAND,

City of London, England, ss:

I, Rowland Lee, Assistant Manager of the Advertisement Department of the Daily Telegraph newspaper, published in the City of London, England, make oath and say that the advertisement "To Depositors of West Virginia Deferred Stock Certificates" attached hereto, was ordered for, and duly appeared in the Daily Telegraph on the following dates: January 15, 19, 22, 26, 29, February 2, 5, 9, 12, 16, 19, 23—all of 1903.

(Signed)

ROWLAND LEE.

Sworn before me

FRANCIS W. FRGOUT,
*Deputy Consul-General of the United States of America at
London, England, at 12 St. Helens Place, London, Eng-
land.*

March 18, 1903.

Copy of Advertisement Referred to Above.

To depositors of "West Virginia deferred certificates" under agreement of deposit, dated the 28th, July, 1898:

NOTICE is hereby given, pursuant to Article 2. Paragraph d, Sec-

tion 1, of the said agreement, that a plan of settlement of the public debt of West Virginia has been formulated and has been approved by the Advisory Board appointed under the said agreement, and all parties in interest are notified that the plan may be obtained, without cost in the City of New York, at the offices of Messrs. Brown Brothers & Company, 59 Wall Street, and in the City of London, England, at the offices of Messrs. Brown, Shipley & Company, Founders-court, Lothbury, E. C., and 123 Pall Mall, W.

95 Dated New York, January 13, 1903.

JOHN CROSBY BROWN, *Chairman*,
CLARENCE CARY,
J. KENNEDY TOD,
BARTLETT S. JOHNSTON,
VIRGINIUS NEWTON,
R. P. CHEW,

Committee.

ROBERT L. HARRISON, *Secretary*.

96

(Copy.)

I, Gilbert Plumbridge, Chief Clerk, in the employment of the proprietors of the Times newspaper, published in the City of London, England, make oath and say that the attached advertisement, "To Depositors of West Virginia Deferred Certificates," was ordered for, and duly appeared in the said newspaper on the following dates: Jan. 14, 17, 21, 24, 28, 31; February 4, 7, 11, 18, 21, all of 1903.

(Signed)

GILBERT PLUMBRIDGE.

Sworn before me, Richard Westcott, Vice and Deputy United States Consul-General, at 12 St. Helens Place, London, England, on the 4th, March, 1903.

(Signed)

RICHARD WESTCOTT,

Vice and Deputy Consul-General of the United States of America at London, England.

This is the advertisement referred to in the above declaration. To depositors of "West Virginia deferred certificates" under agreement of deposit, dated the 28th of July, 1898:

NOTICE is hereby given, pursuant to Article 2, Paragraph d, Section 1, of the said agreement, that a plan of settlement of the public debt of West Virginia has been formulated and has been approved by the Advisory Board appointed under said agreement, and all parties in interest are notified that the plan may be obtained, without cost, in the City of New York, at the offices of Messrs. Brown Brothers & Company, 59 Wall Street, and in the City of London, England, at the offices of Messrs. Brown, Shipley & Company,

97 Founders Court. Lothbury, E. C., and 123 Pall Mall W.
Dated New York, January 13, 1903.

JOHN CROSBY BROWN, *Chairman*.

CLARENCE CARY,

J. KENNEDY TOD,

BARTLETT S. JOHNSTON,

VIRGINIUS NEWTON,

R. P. CHEW,

Committee.

ROBERT L. HARRISON, *Secretary*.

98

West Virginia Debt Settlement.

Committee.

John Crosby Brown,

George F. Baker,

Advisory Board.

W. Pinkney Whyte.

Chairman.

J. Kennedy Tod,

Bartlett S. Johnston,

Wayne MacVeigh.

Clarence Cary,

Wm. C. Legendre,

Lyman J. Gage.

R. P. Chew, of West Virginia.

Robert L. Harrison, *Secretary*.

Depository

Brown Brothers & Company.

Copy

NEW YORK, Dec. 13th, 1904.

Messrs. Brown Brothers & Company, Depository:

We, the undersigned Committee, heretofore appointed and constituted under the certain agreement of July 28, 1898, between ourselves and the holders of deposited certificates of indebtedness or securities known as the Virginia Deferred Certificates, hereby declare that the certain plan of settlement made and approved by the undersigned Committee and the Advisory Board, under date of December 3, 1902, became effective by such approval and by the due publication of such plan under the terms of the said agreement and further by reason of the absence of any notification in writing, or otherwise, from or on the part of the holders of any of the deposited certificates, for more than thirty days after the said publication, of any unwillingness to accept such proposed settlement.

(Signed)

JOHN CROSBY BROWN, *Chairman*.

ROBERT L. HARRISON, *Secretary*.

The above was received in due form this 13th day of December, 1904.

(Signed)

BROWN BROTHERS & CO.

99

EXECUTIVE DEPARTMENT,

CHARLESTON, WEST VIRGINIA, January 27, 1905.

To the Honorable President and Members of the State Senate:

GENTLEMEN: The accompanying papers after oral statements

had been made to me by a Committee representing the State of Virginia, consisting of Hon. Randolph Harrison, Chairman, Col. Joseph Button, Secretary, and Hon. William A. Anderson, Attorney General of that State, were duly presented to me for transmission to the Legislature of West Virginia.

The papers consist of an address or statement of the Committee, representing the Commission appointed by the State of Virginia "to provide for the settlement with West Virginia of the proportion of the public debt of the original State of Virginia proper to be borne by West Virginia" and of a copy of the Act of March 6th, 1900, of the State of Virginia, enlarging the powers and duties of said Commission.

I deem it my duty to transmit these papers for your information.

Respectfully yours, ALBERT B. WHITE, *Governor*.

The papers accompanying the communication of the Governor are as follows:

To His Excellency A. B. White, Governor of the State of West Virginia:

SIR: Under and by virtue of a joint resolution of the General Assembly of the State of Virginia, approved March 6th, 1894, a commission consisting of Hons. Taylor Berry, H. T. Wickham, H. D. Flood, John B. Moon, Randolph Harrison, H. H. Downing and

100 William F. Rhea was continued for the purpose of opening negotiations with the State of West Virginia looking to the adjustment of the proportion of the debt of the original State of Virginia proper to be borne by West Virginia, and by a communication bearing date on the 7th day of January, 1895, from the Hon. Chas. T. O'Ferral, then Governor of Virginia, the Honorable William A. MacCorkle, then Governor of West Virginia, was informed of this fact.

Since the date last named the Honorable Taylor Berry has departed this life, and Honorable J. Thompson Brown has been made a member of the Commission in his stead. And by an act of the General Assembly of Virginia, approved March 6th, 1900, the powers and functions of the Commission have been materially changed and enlarged, as will be seen by an inspection of said act, a copy of which is herewith submitted.

It will be observed that under the provisions of this act the Commission acting by and with the advice and approval of the Attorney General of Virginia, is authorized to make a final settlement and adjustment with West Virginia with respect to the debt of the original State, provided at least two-thirds in amount of the securities known as Virginia Deferred Certificates issued under the Virginia Act of 1871, and a majority of all the other certificates issued by Virginia with reference to said settlement, exclusive of those held by the Literary Fund and Sinking Fund of Virginia, were deposited with or placed subject to the control of the Commission.

On the 14th day of December, 1904, there were so placed on deposit in the name of the Commission, and subject to the control and disposal, \$12,910,555.89 of such certificates, embracing much more than two-thirds of those of 1871, as aforesaid, and a very large majority of all the others, so that the Commission is now authorized,

and empowered by and with the advice and approval of the
101 Attorney General, to make a settlement and adjustment with

West Virginia as provided in said act of March 6th, 1900. The evidence of the deposit of the said certificates with the Commission as above stated is of course subject to inspection by Your Excellency and the proper authorities of West Virginia on request.

Looking to opening negotiations with West Virginia, the Commission at a meeting thereof, held in Richmond, Virginia, December 14th, 1904, authorized the appointment of a sub-committee, consisting of the undersigned Randolph Harrison, Chairman, H. D. Flood, H. H. Downing and John B. Moon, who together with the Attorney General of Virginia should invite the attention of Your Excellency to the unsettled matters between the two States and endeavor to negotiate a settlement of the same on some equitable basis to be agreed upon by the authorities of the two States.

The undersigned, the sub-committee so constituted, acting by and with the advice of the undersigned Attorney General of Virginia, therefore beg leave to call to the attention of Your Excellency the unsettled matters between the two States above referred to, growing out of the debt of the original State, and so respectfully request that they may be laid before the legislature of your State, now in session for their consideration; and that some action may be taken by the Legislature of your State for the purpose of entering into negotiations with the undersigned for a settlement between the two States of the matters aforesaid on some equitable basis either by the appointment of a committee to conduct such negotiations on behalf of your State, or by such other action as the legislature of your State may deem appropriate.

And the undersigned further beg in this connection to call attention to the following facts:

1. That when the State of West Virginia was formed, the original State of Virginia was deprived of more than one-third of
102 its white population and about one-third of its territory, embracing that portion of its territory which by reason of its mineral wealth has since proven to be the most valuable and productive part of the original State.

2. The ordinance of the convention which met at Wheeling in 1861, in providing for the formation of the State of West Virginia, further provided that: "The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, to be ascertained by charging to it all State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government since any part of said debt was contracted, and deducting therefrom the

moneys paid into the Treasury of the Commonwealth from the counties within said new State during the same period." The obligation to assume an equitable proportion of the said debt was again recognized in the first constitution of West Virginia, which was ratified by a vote of her people in 1863, and in which article eight, section eight provided as follows: "An equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, 1961, shall be assumed by this state; and the Legislature shall ascertain the same as soon as practicable and provide for the liquidation thereof by a Sinking Fund sufficient to pay the accruing interest and redeem the principal within thirty-four years." The Constitution of West Virginia of 1872, contains these provisions, article ten, section four: No debt shall be contracted by this State except to meet casual deficits in the revenue to redeem a previous liability of the State," etc., etc., and section five specifies that "The power of taxation of the Legislature shall extend to provisions for the payment of the State debt and interest thereon," etc.

3. The public debt of the original State of Virginia, at the time of the dismemberment, amounted to something more than
103 \$30,000,000 no part of which has ever been borne by West Virginia, nor has any settlement or adjustment been made by West Virginia, either with the present State of West Virginia, or with the creditors of the Original State, to ascertain what her liability might be with respect to said debt, but the whole of it has been left for adjustment to the people of the present State of Virginia.

4. It has been understood that West Virginia was not willing to negotiate directly with the creditors of the original State, and for that reason, and also in order to comply with the requirements of said act of March 6th, 1900, the deposit of said certificates of December 14th, 1904, was made with the Virginia Commission; so that the Commission with the Attorney General of Virginia are now authorized both on behalf of the State of Virginia, and also on behalf of a large majority of all certificate holders interested, to make a final settlement and adjustment of the matters above referred to, and thus finally conclude and dispose of questions which have been long left unsettled to the detriment, it is believed, of both States.

The undersigned only seek to present these matters to your Excellency and through you to the Legislature of your State, because they believe it to be their duty to their own State to do so; and while no accounting or adjustment in the premises has ever been had by West Virginia, either with Virginia or the creditors of the original State, yet inasmuch as the matters involved are now presented by the undersigned, with new and enlarged powers on their part to make and carry into effect a complete and final settlement between the States, it is hoped that the suggestions herein contained will re-

ceive favorable consideration and action on the part of your Excellency and the Legislature of your State.

Respectfully submitted.

(Signed)

RANDOLPH HARRISON

H. H. DOWNING

H. D. FLOOD

JOHN B. MOON

Committee.

Approved:

WILLIAM A. ANDERSON,

Attorney General of Va.

January 25, 1905.

Here follows copy of act of March 6, 1900.

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ADDRESS

On Behalf of the Virginia Debt Commission

BEFORE

THE JOINT COMMITTEES ON FINANCE OF THE WEST VIRGINIA
LEGISLATURE.

In Relation to West Virginia's Contributive Share of the Debt of
Virginia.

By RANDOLPH HARRISON.

Charleston, West Virginia, February 1, 1905.

Mr. Chairman, and Gentlemen of the Finance Committees of the two Houses of the Legislature of West Virginia:

We had the honor a few days ago to present to His Excellency, the governor of West Virginia, a communication in behalf of the State of Virginia in relation to the unsettled matters between the two states, growing out of the debt created before the dismemberment of Virginia. We were officially advised that that communication had been transmitted to the legislature, and by it referred to the appropriate committees for further consideration.

We appear before you tonight in response to an invitation from the two finance committees of this body for the purpose of more fully stating the reasons which impel Virginia to invite your attention to this subject.

It gives us pleasure to avail ourselves of this opportunity to make known to you the object of our mission here.

In considering the question as to West Virginia's obligation to bear a just proportion of the public debt of Virginia, it will be necessary for us to review the origin of that debt, the manner in which and the purposes for which it was created, and West Virginia's relation to the subject.

Beginning with the year 1825 Virginia entered upon an extensive system of internal improvements. She had in mind the development of her western territory. Her statesmen had known for many years prior to that time that the territory now composing
105 the state of West Virginia contained immense resources of wealth, but there had been no definite ascertainment of that fact. They realized that it was essential, in order to ameliorate the condition of her people, who resided in that territory, and in the interest of all the people of Virginia, to develop that section, and establish communication between it and the Virginia seaboard. It was for this purpose that Virginia assumed the burden of a public debt. The development of this system of public improvements was progressive. During the first twenty-five years the debt had grown to about ten millions of dollars; between 1850 and 1861 it was increased by twenty millions of dollars. It is a matter of interest in passing to refer to the fact that the members of the Virginia legislature representing the counties that now compose this State unanimously voted to increase the debt. It is a notable fact that on several occasions it would not have been increased but for the united support of the delegates representing this section of the state, for the eastern and tidewater counties generally opposed the system of internal improvements which Virginia had undertaken. I do not mention this in any critical spirit; it was natural that the residents of this part of the state should want to develop their territory, and I am sure that any one similarly situated at that time would have been governed by the same considerations. The great argument advanced for the increase of the public debt was that, by the development of this section of the state by the construction of turnpikes, canals, bridges, railroads, etc., the wealth of Virginia would be so materially increased that she could bear the burden of the debt without feeling it. And so it came to pass that on the 1st of January, 1861, the public debt of Virginia amounted to about thirty millions of dollars, every dollar of which had been expended in works of internal improvements, the primary object of which was the development of this section of Virginia's territory.

On the 17th of April, 1861, the state of Virginia passed the ordinance of secession, withdrawing from the Union. Shortly thereafter, in the month of May, a number of citizens residing in
106 the town of Clarksburg, met together and called a convention to meet in Wheeling on the 11th of June following. That convention assembled in Wheeling, and organized what was known as the "Restored Government of Virginia." They ignored the government at Richmond, denounced it as revolutionary, and declared that it did not represent the state of Virginia. On June the 20th this convention elected Francis H. Pierpont governor of Virginia, and called a legislature together at Wheeling on July the 1st, 1861, which it declared to be the only true and lawful legislature of the state. This legislature, on July the 9th, elected two United States senators, and provision was made for the election of three congress-

men. Both Houses of Congress admitted these members as from the State of Virginia.

A second convention assembled at Wheeling on the 20th of August, 1861. The "Restored Government of Virginia," having been previously organized, this convention, claiming to represent the state of Virginia, met for the purpose of "creating a new state," and on the 20th of August, 1861, it adopted an ordinance declaring it to be the sense of that convention that a new state should be formed "out of a portion of the territory of Virginia," and to embrace the counties specified in the ordinance.

This ordinance contained the following provision as the condition upon which the new state should be created:

"The new state shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, to be ascertained by charging to it all state expenditures within the limits thereof and a just proportion of the expenses of the state government since any part of said debt was contracted, and deducting therefrom the moneys paid into the treasury of the Commonwealth from the counties within said new state during the same period."

This was the first step towards the formation of the state of West Virginia, and in taking this step it was expressly stipulated
107 that the old state would consent to her dismemberment only on condition that the State should assume a just proportion of her public debt.

This convention authorized delegates to be elected to another convention to assemble in Wheeling on the 26th day of November, 1861, for the purpose of forming a constitution for the new state in accordance with the terms of the ordinance of August the 20th. Accordingly a third convention, claiming to represent Virginia, assembled in Wheeling on November 26th, 1861, and prepared a constitution for the State of West Virginia, the eighth section of the eighth article thereof providing as follows:

"An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this State, and the Legislature shall ascertain the same as soon as practicable and provide for the liquidation thereof by a sinking fund sufficient to pay the accrued interest and redeem the principal within thirty-four years."

This provision was adopted in pursuance of the binding ordinance of the organic convention of August the 20th, 1861; it not only pledged the new State to bear a just proportion of the public debt of Virginia, but required her Legislature to ascertain the same and provide for its payment. Does not that seem fair to you? It seems so to me. West Virginia had helped to create the debt, and reaped a share of its benefit. Do you not think in fairness and justice she ought to bear a just proportion of it, as she agreed to do?

On the 3rd of May, 1862, this constitution was submitted to the people of the counties composing the new State of West Virginia for

ratification, and it was duly reported as ratified by a majority of the voters at the polls.

108 On the 13th of May, 1862, the legislature of the "Restored Government of Virginia" passed an act giving Virginia's consent to the formation of the new state, "under the provisions set forth in the constitution for the state of West Virginia." By that act Virginia expressly stipulated that her consent was given "under the terms stated in the constitution of the state of West Virginia," and this constitution, as we have seen, expressly provided that the new state would bear "its just proportion of the debt of the old state."

The "Restored Government of Virginia" instructed her representatives and senators in Congress to use their influence in furtherance of the passage of an act to create the state of West Virginia.

On the 31st day of December, 1862, the act was passed creating the state of West Virginia. The debates in Congress show that West Virginia would not have been admitted as a state but for her promise to bear a just proportion of the debt of the old state. A brief extract from the debates, when the bill providing for the admission of West Virginia was under consideration, will serve my purpose tonight:

MR. OLIN: "I desire to ask what will become of the bonds and other obligations which Virginia has issued or incurred by the recognition of a new state?"

MR. HUTCHINS: "I will answer my friend from New York. Here is the provision of the Constitution of West Virginia, in reference to that matter: 'An equitable portion of the debt of Virginia prior to January the first, 1861, shall be assumed by this state, and the legislature shall ascertain the same as soon as may be practicable.'"

MR. CRITTENDEN: "* * * There is another question; the state of Virginia owes a large debt. How is this debt to be divided?"

MR. BLAIR: "The constitution framed by the convention of the people of the proposed new state binds the new state to pay its just proportion of the debt owed by Virginia prior to the ordinance of secession."

109 MR. CRITTENDEN: "I only knew that in this bill there was no provision made for a division of the said debt. The gentleman tells us there is provision made for it in the constitution, and I am satisfied with that. As it has been attended to, I have no more to say about it." (Extract from Congressional Globe, 37th Congress, quoted by Hon. J. M. Mason in pamphlet published by him on the subject of the Virginia debt.)

No one can doubt, therefore, that West Virginia owes her existence to her promise to bear a just proportion of the debt of the old state.

The act admitting West Virginia into the Union was signed, as I have stated, on the 31st day of December, 1862, and on June 20, 1863, in pursuance of the proclamation of the president, she took her place in the family of states.

I have given this sketch of the origin of the state of West Virgin-

ia in order to show that she is solemnly pledged to bear a just proportion of the debt of Virginia.

The constitution of West Virginia adopted in 1872 contains the following provisions relating to the public debt:

Article X, Sec. 4, provides that no debt shall be contracted except * * * to redeem a previous liability of the state; and sec. 5 provides that the power of taxation shall extend to provisions for the payment of the state debt and interest thereon. There was no public debt for West Virginia to provide for except her obligation to bear her just proportion of the debt of the state of Virginia.

The legislature of the "Restored Government of Virginia" on the 4th of February, 1863, passed an act transferring to the state of West Virginia all the property of the state of Virginia in the territory of the proposed new state, but on condition that West Virginia "should account for it in the settlement to be had with Virginia."

It is hardly necessary for me at this time to refer to the value of the property so transferred. Suffice it to say that by that act several millions of dollars worth of property was transferred to West Virginia; but the transfer was made on the condition that West
110 Virginia should account for it in the settlement to be had with Virginia.

The stock owned by Virginia in banks alone situated within the territory of West Virginia amounted to several hundred thousand dollars, and in respect to this stock West Virginia, in her Constitution of 1863, authorized the legislature to dispose of the same, but expressly provided that the proceeds of such sale should be applied to the liquidation of the public debt; thereby again recognizing in her fundamental law her obligation to share with Virginia the burden of her public debt.

So, gentlemen, I think you must agree with me that West Virginia's obligation to pay a just proportion of the debt of Virginia is the foundation of her political existence. It is an essential part of the very Constitution under which Congress admitted her into the Union. West Virginia has not always been unmindful of her obligation and duty in this respect. After the war an effort was made by the two states to ascertain by negotiation the fair proportion of the old debt which each should bear. In February, 1870, Virginia sent delegates to Wheeling, West Virginia, then the capital of this state, for the purpose of inviting the governor and the legislature of West Virginia to unite with her in making a statement and settlement of this account. But the governor of West Virginia did not think the time opportune to deal with the subject because the suit between the two states involving the two counties of Jefferson and Berkeley had not then been decided. Soon thereafter the governor of West Virginia sent commissioners to Virginia with authority to state the account, but at that time Governor Walker of Virginia did not feel that he had authority to appoint commissioners, because the legislature of Virginia had in the meantime passed an act to submit the question to arbitration, and so nothing came of this effort to settle the controversy.

I am aware of the fact that at that time some feeling existed on the part of the commissioners of West Virginia as to the manner in which they had been received by the authorities in Virginia; but it is, of course, difficult to determine at this distance the cause for any misunderstanding between those commissioners and Governor Walker. The records only show that the Governor of Virginia felt constrained to decline to appoint commissioners for the reason stated, and renewed his invitation to the State of West Virginia to submit the question to arbitration.

Again in recognition of West Virginia's obligation to Virginia in this matter, the Governor of West Virginia had this to say in a letter dated May 16, 1881:

"The people of this State are willing and anxious to adjust with the mother State the amount of their liability on account of the public debt. The liability can be readily ascertained when the mother state is willing to state the account with us. The convention of the State of Virginia held in Wheeling on the 20th of August, 1861, in giving its consent to the formation of this state out of the territory of the mother state, provided by Section IX of the ordinance passed that day as follows:

"The new State shall take upon itself a just proportion of the debt of Virginia prior to January 1, 1861, to be ascertained by charging to it all state expenditures within the limits thereof and a just proportion of the ordinary expenses of the state government since any part of said debt was contracted and deducting therefrom the moneys paid into the treasury from the counties included within the new state during the same period."

"The validity of this ordinance and the convention which passed the same has received the sanction of every department of the national government.

The Supreme Court of the United States, in a suit in that court instituted by the state of Virginia against West Virginia to recover jurisdiction over the counties of Jefferson and Berkeley, now a part of this state, adjudged said ordinance valid and binding. This state was admitted in pursuance of this ordinance. We admit it is binding authority, and hold ourselves ready at all times to settle with our mother state on that basis. Our obligation is to the mother state, and not to creditors of that state." (Extract from letter published by Hon. J. M. Mason in a pamphlet by him on the subject of the Virginia debt.

So, gentlemen, you perceive that the public authorities of West Virginia in the past fully acknowledged the binding obligation resting on your state to bear a just proportion of the debt. That obligation is none the less binding now than it was then.

Nothing having resulted from the efforts of the two states to ascertain and adjust their respective liabilities, Virginia felt obliged to make some arrangement for the funding of her debt. The war had intervened and left her prostrate and impoverished, but still she recognized her duty to make a fair adjustment with her creditors who had purchased her bonds when her credit was higher than that

of any other state, and to that end, on the 30th of March, 1871, her Legislature enacted what is known as the Funding Bill.

By the terms of this act Virginia assumed responsibility for two-thirds of the Debt. The act provided that a new bond should be issued for two-thirds of each old bond, and that a certificate should be given to represent the other one-third, to bear interest at six per cent., and await payment until Virginia and West Virginia had come to a settlement; and Virginia agreed to hold the old bond, so far as unfunded, in trust for the holder of said certificate.

The debt of Virginia at that time, with interest added, amounted to about forty-five millions of dollars, of which Virginia assumed as her just proportion, two-thirds, or about thirty millions of dollars. The form of the certificate issued, as provided by the Funding Bill, was as follows:

Copy of Certificate under Act of March 30, 1871.

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“COMMONWEALTH OF VIRGINIA.

No. —.

\$—.

TREASURER'S OFFICE, RICHMOND, VA.

“This is to certify that there is due unto — — heirs, executors, administrators or assigns \$—, being one-third of bond surrendered under the provisions of an act approved March 30th, 1871, entitled ‘An Act to provide for the funding and payment of the public debt,’ namely, Bond No. —, with interest amounting to \$—. Payment of said one-third with interest thereon at the rate of six per cent. per annum will be provided for in accordance with such settlement as shall hereafter be had between the state of Va. and W. Va. in regard to the public debt of the state of Virginia existing at the time of its dismemberment, and the State of Va. holds said bond so far as unfunded in trust for the holder hereof or his assigns.

“In testimony whereof this certificate has been signed by the Treasurer and countersigned by the Second Auditor, as provided by law.

“ — —,

“*Treasurer of the Commonwealth of Virginia.*

“ — —,

“*Second Auditor of Virginia.*”

Under the foregoing act about fifteen million dollars of these certificates were issued, and the old bonds were delivered up and are now held by Va., so far as unfunded, in trust to secure the payment of said certificates. These certificates do not in terms release Va. from liability for their payment; they clearly import that there would be a settlement between Va. and W. Va., and that they would be paid when such settlement was had. Va. undoubtedly intended that when a settlement was had the certificate holders must accept W. Va.'s share in full payment of the unsettled one-third of the

debt; but under the form of the certificate it might be contended that Va. was liable for the difference between the face of the certificates and the amount ascertained to be due by W. Va. Hence you will observe that it is of the greatest importance to Virginia to bring about, if possible, a settlement of this controversy, not only
 114 because it is a duty she owes the creditor, but especially for her own protection.

In 1879 the legislature of Virginia passed another act for the funding of her debt by which provision was made the issuance of new bonds to take the place of those outstanding. With the bonds so issued certificates were issued for the unsettled one-third of the debt similar in form to the certificates of 1871, with this important difference, namely, that it was expressly stipulated in the certificate that its acceptance should be a full and absolute release of Virginia from all liability on account of said certificates. While the certificates issued under the act of 1879 imposed no liability, therefore, on Virginia they nevertheless provided that Virginia would aid the creditors holding such certificates, or certificates issued under previous acts, in negotiating with West Virginia for a friendly settlement of the claims of such creditors against the State of West Virginia.

In 1882 a third act for the funding of Virginia's debt was passed and under that act the certificates issued to represent the unpaid one-third of the debt expressly provided that they should be accepted without recourse on Virginia for their payment. These certificates, therefore, like those issued under the act of 1879, impose no liability on Virginia.

By act approved on the 20th of February, 1892, Virginia made a full and final settlement with her creditors and the certificates issued under this act, like those issued under acts of 1879 and 1882, expressly provided that they should be accepted without recourse on Virginia and hence they impose no liability on Virginia.

In as much as the unsettled one-third of the debt of the original state of Virginia is represented by the foregoing four classes of certificates, it becomes important to know the amount of those certificates outstanding.

The office of the second auditor of Virginia shows as follows
 115 follows in respect to these certificates:

Under the act of March 30, 1871, there were issued	
of these certificates	\$15,281,970.47
Of these certificates Virginia holds in her sinking	
fund and in her literary fund	2,578,518.68

Leaving outstanding in the hands of the public of the certificates of March 30, 1871\$12,703,451.79
 The foregoing certificates do not in terms release Virginia from liability for their payment.

Under the act of March 28, 1879, there were issued, and are outstanding in the hands of the public, certificates amounting to \$564,258.87

Under the act of February 14, 1882, there were issued of these certificates	1,775,603.48
Of these certificates Virginia holds in her sinking fund	166,943.33
Leaving outstanding in the hands of the public....	\$1,609,660.15
Under the act of February 20, 1892, there were issued certificates outstanding in the hands of the public..	\$605,320.78
The three last mentioned classes of certificates were issued and accepted without recourse on Virginia.	
The total issue of certificates, therefore, representing the unpaid one-third of the debt of the original state of Virginia is	
Of that amount Virginia holds in her sinking fund and in her literary fund	\$18,227,153.60
Leaving outstanding in the hands of the public of all classes of certificates	2,745,465.01
	\$15,481,691.59

A debt or claim of that magnitude cannot be disposed of by ignoring it, or attempting to waive it aside. The only way to dispose finally of it is to settle it.

Realizing the importance to her own interests of bringing about a friendly settlement of the matter, and in fulfillment of her promise to the creditors to aid in bringing it about Virginia, by resolution of March 6, 1894, appointed commissioners for the purpose of negotiating with West Va. for an adjustment of the proportion of the debt proper to be borne by her.

In January, 1895, Governor O'Ferrell of Virginia communicated a copy of that resolution to Governor McKorkle of W. Va. No response was ever made by W. Va., but we learned through the press that your legislature declined to negotiate with Va. on the basis stated in the resolution creating her commission. We think the purpose and intent of that resolution was misunderstood, but at all events, nothing was done.

Subsequently, by an act of the General Assembly of Va., approved March 6, 1900, the powers of this commission were materially enlarged and the commission was authorized under the terms stated in the act to conclude a settlement with W. Va. or to take such action to that end as might be approved by the attorney general of Va. Under the provisions of this act the commission acting by and with the advice and approval of the attorney general of Va., is fully empowered to make final settlement with W. Va., provided at least two-thirds of the certificates of 1871 and a majority of all the other certificates outstanding in the hands of the public were deposited with or placed subject to the control of the commission. The requirements of that act have been complied with in a manner which far exceeded our most sanguine expectations, for there have been deposited, subject to the control of the commission, more than five-sixths of the entire issue of the certificates. This unexpected and

desirable result has been brought about through the instrumentality of Brown Brothers & Co., bankers of New York, the agents of the certificate holders' committee. The standing of this house is doubtless known to you, or certainly to many of you; it does not engage in "frenzied finance," but on the contrary it is known as one of the most reliable and responsible firms in the financial world.

Through the agency of Brown Bros. Co. more than five-sixths of all the certificates outstanding in the hands of the public have been assembled and are held on deposit subject to the control of
117 the Virginia commission under an agreement with the owners of those certificates to accept whatever may be received from West Virginia in full discharge of the unsettled one-third of the debt of Virginia.

Of the certificates of 1871 outstanding in the hands of the public (amounting to \$12,703,451.79) Brown Bros. & Company now hold \$10,639,776.42.

Of the certificates of 1879 outstanding in the hands of the public (amounting to \$564,258.87) Brown Bros. & Company now hold \$440,642.61.

Of the certificates of February 14, 1882, outstanding in the hands of the public (amounting to \$1,608,660.15) Brown Bros. & Company now hold \$1,285,680.55.

Of the certificates of February 20, 1892, outstanding in the hands of the public (amounting to \$605,320.78) Brown Bros. & Company now hold \$544,456.31.

The aggregate amount of all certificates held by Brown Bros. & Company is, therefore, \$12,910,555.89.

The Virginia commission has full power and authority to deliver up those certificates as an entirety to be cancelled upon payment by West Virginia of whatever may be ascertained to be her just proportion of the debt of Virginia—be it much or little. We stand ready, of course, to exhibit the evidence of the deposit of those certificates with us to the proper authorities of West Virginia.

The contract under which these certificates are deposited subject to the control of the Virginia Commission, will expire in September, 1905, unless, in the meantime, negotiations for a settlement, or some action looking to that end, have been undertaken.

At a meeting of the Virginia commission held in Richmond on December 14, 1904, a sub-committee was appointed who, together with the attorney general of Virginia, were requested to communicate these facts to the governor and legislature of West Vir-
118 ginia, and invite their co-operation in a friendly adjustment and settlement of the account between the two states. Our visit here is in discharge of the duty assigned us. Do not imagine that Virginia has the slightest intention of meddling with the affairs of West Virginia, or of volunteering advice. She has ventured to bring the subject to your attention in compliance with her undertaking to the creditors, and especially because her own interests are involved. Virginia felt that she would be derelict in her duty to herself and in her duty to your state if she failed to bring to your

notice the exceptional opportunity now presented to dispose finally of this vexatious question.

Is there any reason why West Virginia should not join Virginia in stating this account? I am sure, gentlemen, you cannot dissent from the proposition that your state is liable for some part of the debt, whatever the amount may be. As far as it is possible for a state to be committed by the solemn provisions of its organic law and by the repeated declarations of its public authorities, West Virginia is bound—bound in equity and good conscience—to bear whatever may be ascertained to be her fair proportion of the debt of Virginia. No account has ever been stated between the two states. How then, can West Virginia declare that she owes no part of this debt until the account is stated? She is solemnly pledged to state this account. Ought she not to redeem this pledge? No state can refuse to do what is fair and right in respect to her public obligations and not suffer for it. We do not ask that West Virginia shall commit herself as liable in any specific amount. We make no claim against her for any definite sum. We do not know what a statement of the account will show; if it shows that West Virginia is not liable for any amount that will end the matter. We only ask that your state will, through the proper authorities, unite with Virginia in stating the account between the two states in order that the question of
119 her liability, if any, may be authoritatively ascertained. The work of your commission will, of course, be subject to such action as West Virginia might deem proper in the premises.

Would any one of you, if a man thought he had an honest claim against you, be afraid to meet him and consider it with him? Then why should you hesitate to commit your state to the same course in this respect which you as an individual would not hesitate to take?

West Virginia has always taken the position that her liability on account of this debt was to Virginia and not to the creditors, and that her liability must be ascertained on the basis of the Wheeling ordinance. This ordinance not only committed West Virginia to bear her just proportion of the debt of Virginia, but states how the account shall be stated in order to ascertain the amount of the debt for which West Virginia is liable. We are ready to unite with you in stating the account on the basis of the Wheeling ordinance, or West Virginia may choose any other just and equitable basis, if she prefers, on which the account shall be stated, and we will abide by her choice. We have no interest whatever in this matter except to discharge our duty to our state by bringing about, if possible, a fair and final settlement of this controversy. Unless the two states can dispose of it we may confidently expect it to be referred to the courts for settlement, and in that event the decision of the court has already been plainly foreshadowed. In the case of *Hartman v. Greenhow* (decided October term, 1880), 102 U. S., page 672, the Supreme Court reviewed the legislation of Virginia in relation to her public debt, and in referring to West Virginia's liability for a portion of it the court, through Justice Field had this to say:

“It appears from the statutes to which we are referred—and we

know the fact as a matter of public history—that prior to the late civil war Virginia had become largely indebted for moneys borrowed to construct public works in the state. The moneys were obtained upon her bonds, which were issued to an amount exceeding 120 \$30,000,000. Being the obligation of a state of large wealth, which never allowed its fidelity to its promises to be questioned anywhere, the bonds found a ready sale in the markets of the country. Until the civil war the interest on them was regularly and promptly paid. Afterwards the payments ceased, and until 1871, with the exception of a few small sums remitted in coin during the war to London for foreign bondholders, or paid in Virginia in Confederate money, and a small amount paid in 1866 and 1867, no part of the interest or principal was paid. During the war a portion of her territory was separated from her, and by its people a new state, named West Virginia, was formed, and by the Congress of the United States was admitted into the Union. Nearly one-third of her territory and people were thus taken from her jurisdiction. But, as the whole state had created the indebtedness for which the bonds were issued, and participated in the benefits obtained by the moneys raised, it was but just that a portion of the indebtedness should be assumed by that part which was taken from her and made a new state. Writers on public law speak of the principle as well established that where a state is divided into two or more states, in the adjustment of liabilities between each other, the debts of the parent state should be ratably apportioned among them. On this subject Kent says: "If a state should be divided in respect to territory, its rights and obligations are not impaired; and if they have not been apportioned by special agreement, their rights are to be enjoyed and their obligations fulfilled by all the parts in common." (1 Com., 26.) And Halleck, in speaking of a state divided into two or more distinct and independent sovereignties, says: In that case the obligations which have accrued to the whole before the division are, unless they have been the subject of a special agreement, ratably binding upon the different parts. This principle is established by the concurrent opinions of text writers, the decisions of the courts, and the practice of nations." (Internat. L., ch. 3, sec. 27.)

"In conformity with the doctrine thus stated by Halleck, both states—Virginia and West Virginia—have recognized in their constitutions their respective liability for an equitable proportion of the old debt of the state, and have provided that measures should be taken for its settlement. * * *

"The Constitution of West Virginia, which went into effect in 1863, declared that "An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861," should "be assumed" by the state, and that the legislature should "ascertain the same as soon as practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years." (Art. 8, sec. 8.)

Virginia lost by the formation of the state of West Virginia one-

third of her territory and more than one-third of her white population. To that extent she was deprived of possessions which belonged to her when the debt was contracted. Suppose fifty of the remaining counties of Virginia should decide to organize themselves into a new state to be called "Eastern Virginia;" would you say it was fair and right for them to do so and take the public property within their borders, and leave the remaining counties constituting the state of

121 Virginia to bear the burden of a debt created for the benefit of the whole? The Supreme Court of the United States has, as we have just seen, answered that question in the negative, and I am sure your sense of justice would impel you also to answer "No." In that event you could not justify West Virginia in declining to bear a just proportion of the debt of the mother state.

Another decision of the Supreme Court of the United States has an important bearing on the liability of the two states on account of this debt. I refer to the recent decision of South Dakota against North Carolina (decided February 1, 1904), 192 U. S., page 286.

North Carolina had issued certain bonds which were outstanding in the hands of purchasers. She declined to make provision for their payment, feeling that she was justified in that course. In order to test the liability of North Carolina a holder of a large amount of those bonds donated ten of them of the face value of \$10,000.00 principal to the state of South Dakota, with the understanding that South Dakota, would institute suit against North Carolina to enforce payment. An individual cannot sue a state, but the right of one state to sue another is expressly preserved by the Constitution of the United States. South Dakota accepted the gift and instituted suit in the Supreme Court of the United States against North Carolina, and the court gave judgment against North Carolina for the amount of the bonds with accrued interest.

If when the contract under which we hold control of the certificates expires nothing has been done looking to a settlement, and those certificates should be released and restored to the owners, it may prove to be the opening of a veritable Pandora's box. Under the authority of the South Dakota-North Carolina case, the attempt might be made to enforce collection of this debt by donating some of the certificates of the issue of 1871 to a state on condition that a suit should be instituted against Virginia and West Virginia to compel the statement of the account between them, and the payment of the liability apportioned to each one. We are reliably
122 informed that the governor of one of the states has already been approached with an offer to donate to his state \$100,000.00 of those certificates on condition that he would cause such a suit to be instituted. He declined, but some other governor might not be influenced by as delicate sense of propriety.

We feel that these considerations should appeal strongly to you to unite with Virginia in the effort to make a friendly settlement of this matter. Surely the two states can make a far better settlement than the courts can make for them. If we do not take the matter in our own hands the only alternative is a settlement by compulsion.

Resolutions that we do not owe anything will not avail. The holders of a debt amounting to about fifty millions of dollars will not be satisfied with your statement or with ours that we do not owe it. Unless your state will join Virginia in the effort to dispose finally of this question, you may rest assured that, like Caesar's ghost, it will meet you at Philippi. The unsettled one-third of this debt now amounts to about fifty millions of dollars. No one can say what the extent of West Virginia's liability will be if the controversy is settled in court, but I will venture the assertion that in a friendly adjustment, it is entirely probable that we can effect a settlement within one-tenth of that sum. In this connection I cannot forbear a reference to what Virginia has done towards bearing the burden of this debt. The records of the office of the second auditor of Virginia show the following amounts paid by Virginia on account of the public debt of the old state since January 1, 1861:

123	Amount of interest paid from January 1, 1861, to January, 1905	\$34,551,642 85
	Bonds now held in sinking fund	\$1,111,500 00
	Bonds paid off and cancelled	8,863,994 49
		<hr/> 9,975,441 49
	Total of interest and bonds paid off	\$45,527,134.34
	New bonds of Virginia issued for portion of debt funded and assumed by her	26,850,820 00
		<hr/>
	Total sum of principal and interest paid off and assumed and now carried by Virginia on account of the old debt	\$72,377,954 34

From the foregoing you will observe that the public debt of Virginia is now \$26,850,820.00, and on this sum she pays an annual interest charge of \$877,862.27. (Report of the second auditor of Virginia for 1904 in relation to the public debt.)

Do you not think that Virginia has borne her share of this common burden, especially in view of the trials and adversity through which she has passed? During four long years she withstood the shock of battle, and came out of that trying ordeal crushed, impoverished and dismembered. Then followed the night of reconstruction, when for five years she endured the bitterness and humiliation of military rule. But so soon as she regained control of her own affairs she met her creditors and, in spite of her poverty, endeavored to do her duty by them.

In adjusting her liability with her creditors and providing for its payment she has done all that she could do, and no more could be expected of her. The trials and sacrifices through which she has passed have left no trace of bitterness—least of all does she cherish any resentment against her youngest daughter. On the contrary, she rejoices in the wealth and power with which a benignant Providence has blessed you. She only appeals to you not to let pass the

present golden opportunity to finally dispose of the only remaining question in connection with her public debt. She earnestly hopes that her suggestion will commend itself to your good judgment, and that your legislature will authorize the appointment of commissioners, with power to co-operate with us in stating the account
 124 between the two states. If, however, your action shall be unfavorable, Virginia will feel that she has done her duty, and that responsibility for the consequences will not lie at her door.

In taking leave of you, gentlemen, I cannot refrain, on behalf of myself and associates, including the attorney general, an eminent citizen of my state, from expressing to you our sincere appreciation of the cordial reception accorded us here not only by His Excellency, your governor, but by your committees to-night. I can assure you that whatever may be the result of our mission, we will recall with pleasure the considerate attention you have shown us.

125 Memorandum of agreement, made this 14th day of December, 1904, between the Depositing Committee of the securities known as the Virginia Deferred Certificates as constituted under the contract of July 28th, 1898, and of which John Crosby Brown is Chairman, and Robert L. Harrison, Secretary, acting under the plan of settlement approved on December 3rd, 1902, by the Advisory Board referred to in the said contract, hereinafter referred to as the Depositing Committee, party of the first part, and the Commission constituted on behalf of the State of Virginia for the purpose of bringing about a settlement with the State of West Virginia with respect to said certificates as constituted and acting under the joint resolution of the General Assembly of the State of Virginia, approved March 6, 1894, and the act of said General Assembly, approved March 6, 1900 and of which John B. Moon is Chairman, and Joseph Button is Secretary hereinafter referred to as the Virginia Commission, party of the second part:

Whereas, by an agreement entered into between the above parties on the 18th day of September, 1902, certain of the certificates aforesaid amounting in the aggregate to \$10,347,570.85 were tendered by the Depositing Committee Aforesaid to the said Virginia Commission, and were placed subject to the control of the said Commission upon the agreement and arrangement on the part of the said Commission acting for the State of Virginia under the said joint resolution and Act of Assembly aforesaid, that the said Commission should enter into negotiations with the State of West Virginia or the constituted authorities thereof for the purpose of effecting with West Virginia a settlement with respect to the said certificates, in accordance with the said contract of July 28th, 1898, and in accordance with such plan of settlement as was then proposed or might thereafter become effective, and that the said Commission would, by and with the advice and approval of the Attorney General of Virginia, take such action as they might deem needful in the premises;

and that in the event such a settlement was so made, then it
 126 was agreed that the amount realized thereon should be ac-

cepted in full satisfaction of all the claims of the certificate-holders thereunder, and that the said Committee would surrender to the said Commission, in exchange for such amount, the certificates so placed subject to the control of said Commission. And it was further specified in the said agreement of September 18, 1902, that the same should apply to and include all such certificates as might thereafter be deposited with and held by the said Committee under the said contract of July 28, 1898, and the the said agreement should constitute an arrangement and contract between the said Committee acting for the said certificate-holders with the State of Virginia for obtaining a settlement with West Virginia, and that the same should continue binding upon the parties and upon the holders of the certificates so deposited for the three years next ensuing from the date of the said agreement; that is to say, until the 18th day of September 1905. And the said agreement further provided that the same should be subject to renewal and extension for such further time as might be agreed upon between the parties and to such modification and amendment as might thereafter be agreed upon; and

Whereas, the said agreement of September 18, 1902, was approved by the Hon. William A. Anderson, Attorney General of Virginia, by his endorsement at the foot thereof on the 29th day of September, 1902; and

Whereas, the provisions of the said agreement last named were fully approved and recommended on the 3rd day of December, 1902, by the Advisory Board referred to in the said contract of July 28, 1898, as appears by the plan of settlement made and approved by the said Committee and the Advisory Board and bearing date December 3rd, 1902, of which plan of settlement publication was duly made as provided in the said contract of July 28, 1898, and no notification whatsoever was given to the said Committee, either directly or through any depository, by any of the holders of the deposited certificates, of their unwillingness to accept the proposed settlement as set forth in the said plan so published and more than thirty days having elapsed after the said publication was completed, and the said plan of settlement having therefore become complete; and of this fact the declaration in writing of the Committee having been duly made to the only depository under the said contract, to wit Messrs. Brown Brothers & Company, of 59, Wall Street, New York, the said plan of settlement thereupon became effective and final; and

Whereas, it is now proposed under the terms of the said agreement of September 18, 1902, and by way of modification thereof as therein provided, to place more fully and completely under the control of the said Virginia Commission all the certificates aforesaid which had up to that date been deposited, and also all thereafter deposited so that the said Virginia Commission may be given full and complete control of all the said certificates in their proposed negotiations with the State of West Virginia, and also in any action and proceeding which may be taken or instituted by the said Virginia

Commission by and with the advice and approval of the said Attorney General under the said Act of the General Assembly of Virginia March 6, 1900:

Now therefore this agreement witnesseth: that the aforesaid Depositing Committee does hereby authorize and direct their said Depository Messrs. Brown Brothers & Company to issue to the Virginia Debt Commission a certificate that all the aforesaid Virginia Deferred Certificates which have up to this time been deposited with the said Brown Brothers and Company under the said depositing agreement of July 28, 1898, and all which may hereafter and before the 18th day of September, 1905, be so deposited with the said depository are held by the said depository on deposit for and subject in all respects to the control and disposition of the said Virginia Commission in pursuance of the said joint resolution and Act of the General Assembly of Virginia; and to this end the said Messrs.

128 Brown Brothers & Company are authorized and instructed to issue such certificate to the said Virginia Commission in such form as to show that all of the certificates aforesaid have been received and are held by them on deposit for the said Virginia Commission and subject to the control and disposal of the said Commission:

But this agreement shall continue in force only until the said 18. day of September, 1905, when the said certificate issued by the said Brown Brothers and Company to the said Virginia Commission for the purpose of making a settlement with West Virginia as aforesaid shall be returned to the said Depositing Committee, unless a settlement shall have been before that time negotiated with West Virginia in pursuance of said contract of September 18th, 1902, or unless negotiations be then pending with the properly constituted authorities of West Virginia for such settlement upon some equitable basis which has been agreed to by said Commission and the authorities of West Virginia aforesaid. Provided, however, that it is fully understood and agreed that the time for continuing in force this agreement may be extended by the consent and agreement of the parties hereto indorsed hereon at the foot hereof, for such length of time and upon such conditions as the parties may hereafter specify; and this agreement may be changed, modified and amended with respect to the action and proceedings to be taken or instituted by the said Commission in the premises, as may hereafter be agreed upon by the parties and the indorsed as aforesaid, or as may be specified in a further and supplemental agreement between the parties.

In testimony whereof the signatures of the Chairman of the said Depositing Committee and of the Virginia Commission, attested by the respective Secretaries thereof, are herunto affixed on the day and year first above written.

JOHN CROSBY BROWN, *Chairman.*

ROBERT L. HARRISON, *Secretary.*

JOHN B. MOON,

Chairman of Virginia Commission.

JOSEPH BUTTON, *Secretary.*

- 129 The foregoing agreement is hereby approved as having been entered into by my advice and approval.

WILLIAM A. ANDERSON,
Attorney General of Virginia.

Dated December 14, 1904.

- 130 The foregoing agreement of December 14th, 1904, together with the contract of September 18th, 1902, therein referred to, are hereby extended in all their provisions until December 1st, 1905, and they shall remain in full force until that date just as if December 1st, 1905, instead of Sept. 18th, 1905, had been the date originally named therein for their limitation, with the right of extension, enlargement and modification on or before Dec. 1st, 1905, in all respects as therein specified.

Given under our hands this 9th day of Sept. 1905.

JOHN CROSBY BROWN,
Chairman Depositing Committee.

ROBT. L. HARRISON, *Secretary.*

JOHN B. MOON,
Chairman Virginia Commission.

JOS. BUTTON, *Secretary.*

The above extension of the contracts above referred to is hereby approved, this 9th day of September, 1905.

WILLIAM A. ANDERSON,
Attorney General of Virginia.

- 131 Upon the execution of the foregoing contract of December 14, 1904, hereto annexed, Messrs. Brown Bros. & Co., Bankers of New York, N. Y., the depository referred to in said contract, issued to the Virginia Commission therein named the certificate provided for in said contract, which was also in the form of a receipt and showed that Virginia deferred certificates of 1871 to the amount of \$10,639,776.42 and certificates of other dates to the amount of \$2,270,779.47 were held by said Brown Bros. & Co. on deposit for and subject to the control and disposal of said Commission; thus placing subject to the complete control and disposal of the Commission considerably more than two-thirds of the total of \$12,703,451.79 of the certificates of 1871 outstanding and in the hands of the public, and a large majority of the total of \$2,778,239.80 of the other certificates so outstanding.

Thereafter, in January and February, 1905, the Virginia Commission, through its properly constituted sub-committee acting with the Attorney General of Virginia, made to the Governor and Attorney General of West Virginia, and to the Finance Committees of the Legislature of that State, which was then in session, a full statement and presentation of the matters outstanding and unsettled between the two States in connection with the deferred certificates known as the Virginia Deferred Certificates under a joint resolution of the General Assembly of Virginia approved March 6, 1894, and an act of the said General Assembly approved March 6, 1900, and of

aforesaid, accompanied by an urgent plea on behalf of the State of Virginia that the Legislature of West Virginia would, at least, appoint a Committee or other public functionary with authority to take up the questions involved for the purposes of discussion and negotiation, but the Commission was again met, as it had been in a previous attempt to open negotiations on the subject, by an absolute refusal on the part of the authorities of West Virginia to treat on

the subject at all thus leaving to the Virginia Commission
132 and Attorney General of that State no possible means of bringing about the settlement, which they are charged with the responsibility of making, except by a resort to the Court having jurisdiction of controversies between States.

Now, therefore, it is hereby stipulated and agreed by and between the Depositing Committee, named as the party of the first part in the said foregoing contract of December 14th, 1904, and the Virginia Commission therein named as the party of the second part, the said Commission acting in this behalf by and with the advice and approval of the Attorney General of Virginia, that in accordance with the provisions contained in the said foregoing contract and addendum thereto of September 9th, 1905, the same is hereby amended, modified and extended as follows, to wit:

1st. Neither the said foregoing contract of December 14th, 1904, nor the contract therein referred to between the same parties, bearing date September 18th, 1902, shall expire on the first day of December, 1905, but the same shall continue in force in all respects just as if no time limit had been named in either of said contracts, and this agreement shall be taken as a continuation, modification and extension of said contracts.

2nd. The certificate or certificates heretofore given by Brown Bros. & Co., the depository of the said Committee, to the said Virginia Commission, covering the deferred certificates aforesaid, shall be retained by the said Commission and shall remain in full force and effect without regard to time limit and the said Brown Bros. & Co. shall issue and give to the said Commission such other and further certificates and receipts in the premises, by way of amendment or in lieu of those already given or otherwise, as may be deemed needful or desirable in order to place said deferred certificates more
completely and finally under the control and at the disposal
133 of the said Commission for the purpose of carrying out this agreement; and especially shall they give such certificates or receipts to cover all such Virginia deferred certificates as have been or may be deposited with them and not covered by certificates or receipts previously given to the Commission; and the said Virginia Commission are hereby given and invested with the full and complete control and right to dispose of all deferred certificates now or hereafter covered by or embraced in the receipts and certificates of Brown Bros. & Co., as aforesaid.

3rd. The said Virginia Commission hereby stipulate and agree,

by and with the advice and approval of the Attorney General of Virginia, that, in their judgment, it is needful and proper, in order to protect the interest of the State and bring about and carry into effect a settlement in the premises, that a suit should be instituted in the name of the State of Virginia against the State of West Virginia in the Supreme Court of the United States asking for a judgment and settlement by that Court of the matters aforesaid unsettled and undetermined between the two States, arising or growing out of the debt of the original State of Virginia before its dismemberment and on account of which said deferred certificates were issued, the same to be brought and instituted as provided in the Act of the General Assembly of Virginia, of March 6th, 1900, referred to in said contract of December 14th, 1904; and the said Virginia Commission acting by and with the advice and approval of the Attorney General of that State, do hereby undertake and agree that such a suit shall be brought against the State of West Virginia for the purpose of obtaining a settlement as aforesaid, as soon as the pleadings, papers

and documents relating thereto can be conveniently and properly drawn up and prepared for presentation to the said Court, which said suit shall be instituted, conducted and proceeded with in all respects in accordance with the provisions of the said Act of the General Assembly of Virginia and the Joint Resolution of the said General Assembly of March 6th, 1894, also referred to in said contract of December 14th, 1904; but the power to make and carry into effect a settlement and adjustment in the premises by agreement with West Virginia as to the deferred certificates placed subject to the control of the Commission as aforesaid, as provided in the previous contracts aforesaid, shall remain vested in the said Commission, notwithstanding the institution and pendency of such suit.

4th. And the Virginia Commission do further undertake and agree that, in accordance with the terms and conditions of the said Joint Resolution and Act of the General Assembly of Virginia, they will account for, pay over and deliver such amount, either in cash or securities, as may be realized from West Virginia through any settlement made by the said Commission with that State, either by means of an adjudication or recovery in said suit or otherwise, for or on account of the deferred certificates now or hereafter deposited and placed subject to their control as aforesaid, to the said Depositing Committee in full settlement and satisfaction of all claims under said certificates; and the said Depositing Committees agrees on behalf of the depositors of said deferred certificates so placed subject to the control of the said Commission and on behalf of those entitled to the benefit of said certificates as assignees of said depositors or otherwise to accept as aforesaid such amount, either in cash or securities, as may be determined or ascertained in any such suit to be due by, or as may be realized through any adjustment or settlement as aforesaid from the State of West Virginia on account of the said certificates and on account of the bonds represented by and mentioned in the said certificates respectively, in

full settlement and satisfaction of all claims on account of said certificates and on account of the bonds therein mentioned, and to accept and take such adjudication against the State of West Virginia in full discharge and acquittance of all claims in the premises against the State of Virginia.

5th. It is further understood and agreed that if from any cause the said Commission shall fail or be unable to bring about such adjustment or settlement or to obtain a determination or ascertainment of the liability of West Virginia as hereinbefore provided for, then it shall be the duty of the said Commission to restore to the control of the said Depositing Committee all such deferred certificates as may have been placed subject to the control and disposal of said Commission as aforesaid.

Richmond, Va., November 24th, 1905.

JOHN CROSBY BROWN, *Chairman,*

R. P. CHEW,

WM. C. LEGENDRE,

CLARENCE CARY,

J. KENNEDY TOD,

GEO. F. BAKER,

BARTLETT S. JOHNSTON,

Depositing Committee,

JOHN B. MOON,

WM. F. RHEA,

H. D. FLOOD,

H. H. DOWNING,

H. T. WICKHAM,

RANDOLPH HARRISON,

J. THOMPSON BROWN,

Virginia Commission.

Attest:

JOS. BUTTON,

Sec'y Va. Commission.

RO. L. HARRISON,

Secretary Committee.

136. The foregoing contract of this date was entered into by and with the advice and approval of the undersigned, William A. Anderson, Attorney General of Virginia, as in said contract state and set forth; and the same is concurred in by him as such Attorney General.

Richmond, Va., November 24th, 1905.

(Signed)

WILLIAM A. ANDERSON,

Attorney General of Virginia.

137. This is to certify that we, the undersigned, Brown Brothers & Company (Bankers), of 59 Wall Street, New York City, N. Y., have received of the Commission of the State of Virginia, constituted and authorized to act with respect to the securities

which John B. Moon, of Charlottesville, Va., is Chairman, and Joseph Button, of Appomattox, Va., is secretary, the following Virginia Deferred Certificates, which we hold on deposit for and subject to the control and disposition of said Commission, to wit:

Certificates of 1871:			
Principal		\$9,317,009.30	
Sterling scrip	\$10,666.66		
Dollar scrip	32,387.00	43,053.66	
			\$9,366,062.96
Certificates of 1879:			
Principal		\$403,362.62	
Dollar scrip	\$33,890.83		
Sterling scrip	3,389.16	37,279.99	
			440,642.61
Certificates of 1882:			
Principal		\$716,416.07	
Scrip		545,787.36	
			1,262,203.43
Certificates of 1892:			
Principal		\$259,825.71	
		\$284,563.93	
			544,389.64
			\$11,607,298.64

And we further agree to hold on deposit for and subject to the control of said Commission as aforesaid such further certificates as may be deposited with us through or for the said Commission, between this and the 18th day of September, 1905.

Given under our hands this 14th day of December, 1904.

BROWN BROTHERS & CO.

138 Brown Brothers & Co., 59 Wall Street.

West Virginia Debt Settlement. (C)

NEW YORK, *January 23rd*, 1905.

Hon. John B. Moon, chairman Virginia debt commission, Charlottesville, Va.

DEAR SIR:—Since we gave you the receipt and certificate of Deposit of December 14th, 1904, there have been deposited with us, and we hold for and subject to the control and disposition of your Commission, the following Virginia Deferred Certificates:

Issued under act of 1871, to amount of	\$1,279,713.46
do. 1882, do.	23,477.12
do. 1892, do.	66.67

Total additional certificates \$1,303,257.25
These certificates are held by us for your Commission in like

manner, and on the same terms and conditions as those specified in our said receipt and certificate of December 14th, 1904.

We remain, yours very truly,

BROWN BROTHERS & CO.

P. S.—The complete statement is as follows:

Issue of 1871:			
Principal		\$10,596,402.76	
Sterling scrip	\$10,666.66		
Dollar scrip	32,707.00	43,373.66	
			\$10,639,776.42
Issue of 1879:			
Principal		\$403,362.62	
Dollar scrip	\$33,890.83		
Sterling scrip	3,389.16	37,279.99	
			440,642.61
Issue of 1882:			
Principal		\$738,819.72	
Scrip		546,860.83	
			1,285,680.55
Issue of 1892:			
Principal		\$259,825.71	
Scrip		284,630.60	
			544,456.31
Total deposit to January 23rd, 1905		\$12,910,555.89	
			B. B. & CO.

139 Brown Brothers & Co., 59 Wall Street

West Virginia Debt Settlement.

(T.)

NEW YORK, *January 4th*, 1906.

Hon. John B. Moon, chairman Virginia debt commission, Charlottesville, Va.

DEAR SIR: Since we gave you the receipt and Certificate of Deposit of December 14th, 1904, there have been deposited with us, and we hold for and subject to the control and disposition of your Commission, the following Virginia Deferred Certificates:

These certificates are held by us for your Commission in like manner, and on the same terms and conditions as those specified in our said receipt and Certificate of December 14th, 1904.

We remain, yours very truly,

BROWN BROTHERS & CO.

Issued under the act of 1871, to amount of	\$1,491,231.13
do. 1879, do.	23,250.00
do. 1882, do.	51,588.97
do. 1892, do.	66.67

Total additional certificates \$1,566,136.77

P. S.—The complete statement is as follows:

Issue of 1871:

Principal	\$10,806,785.43	
Sterling scrip	\$10,666.66	
Dollar scrip	33,842.00	44,508.66
		<hr/>
		\$10,851,294.09

Issue of 1879:

Principal	\$426,612.62	
Dollar scrip	\$33,890.83	
Sterling scrip	3,389.16	37,279.99
		<hr/>
		463,892.61

Issue of 1882:

Principal	\$757,653.05	
Scrip	556,139.35	
		<hr/>
		1,313,792.40

Issue of 1892:

Principal	\$259,825.71	
Scrip	284,630.60	
		<hr/>
		544,456.31

Total deposit to January 4th, 1906\$13,173,435.41

BROWN BROTHERS & CO.

140 STATE OF NEW YORK,

County of New York, To-wit:

I, Wm. Gerard Vermilye, being first duly sworn, do depose and say that I am one of the Cashiers of Brown Brothers & Co., bankers of New York, N. Y., and have charge of their vaults and of the securities therein deposited, including the securities known as Virginia deferred Certificates, and that I have had charge of the filing of said certificates deposited with said Brown Brothers & Co. and of the keeping of a record thereof as filed; and that the statement or certificate of the said Brown Brothers & Co. herewith annexed made to John B. Moon, Chairman of the Virginia Debt Commission, bearing date January 4th, 1906, correctly sets forth the said Virginia Deferred Certificates so deposited and placed in the vaults of said Brown Brothers & Co. which said certificates to the amount set forth in said statement of Brown Brothers & Co. have been by order of the said Virginia Commission this day placed in sealed boxes and transferred to the Central Trust Company of New York, N. Y.

WM. GERARD VERMILYE.

The foregoing affidavit was this day subscribed and sworn to by Wm. Gerard Vermilye before me, a Notary Public in and for the State and County of New York.

Given under my hand and Notarial Seal this 5th day of January, 1906.

LEGRAND VAN VALKENBURGH.

[NOTARIAL SEAL.]

Notary Public, Kings County.

Certificates filed in New York County.

141

Central Trust Company of New York.

54 WALL STREET, January 5th, 1906.

The undersigned, the Central Trust Company of New York, N. Y., hereby certifies and acknowledges that it has this day received from Brown Brothers & Co. three boxes under seal said to contain the Virginia deferred Certificates to the amount of \$13,173,435.41 referred to in the communication of said Brown Brothers & Company to John B. Moon, Chairman of the Virginia Commission, bearing date January 4th, 1906, which said sealed boxes and their contents are held by the undersigned Trust Company on deposit for and subject to the order and control of the Virginia Commission, constituted and authorized to act with respect to said Deferred Certificates under a joint resolution of the General Assembly of the State of Virginia, approved March 6th, 1894, and an act of the said General Assembly approved March 6th, 1900, of which John B. Moon, of Charlottesville, Va., is Chairman, and Joseph Button, of Appamatox, Va., is Secretary, the said certificates having been turned over to the undersigned Trust Company by said Brown Brothers & Company to be held by the undersigned on deposit for and subject to the control and disposal of said Virginia Commission as above stated.

CENTRAL TRUST CO. OF N. Y.,

(Signed)

F. L. GRANT, Sec'y.

142

Virginia, Second Auditor's Office.

(Statement Made Sept. 17, 1902.)

West Virginia Certificates Issued by Virginia in Funding Her Debt.

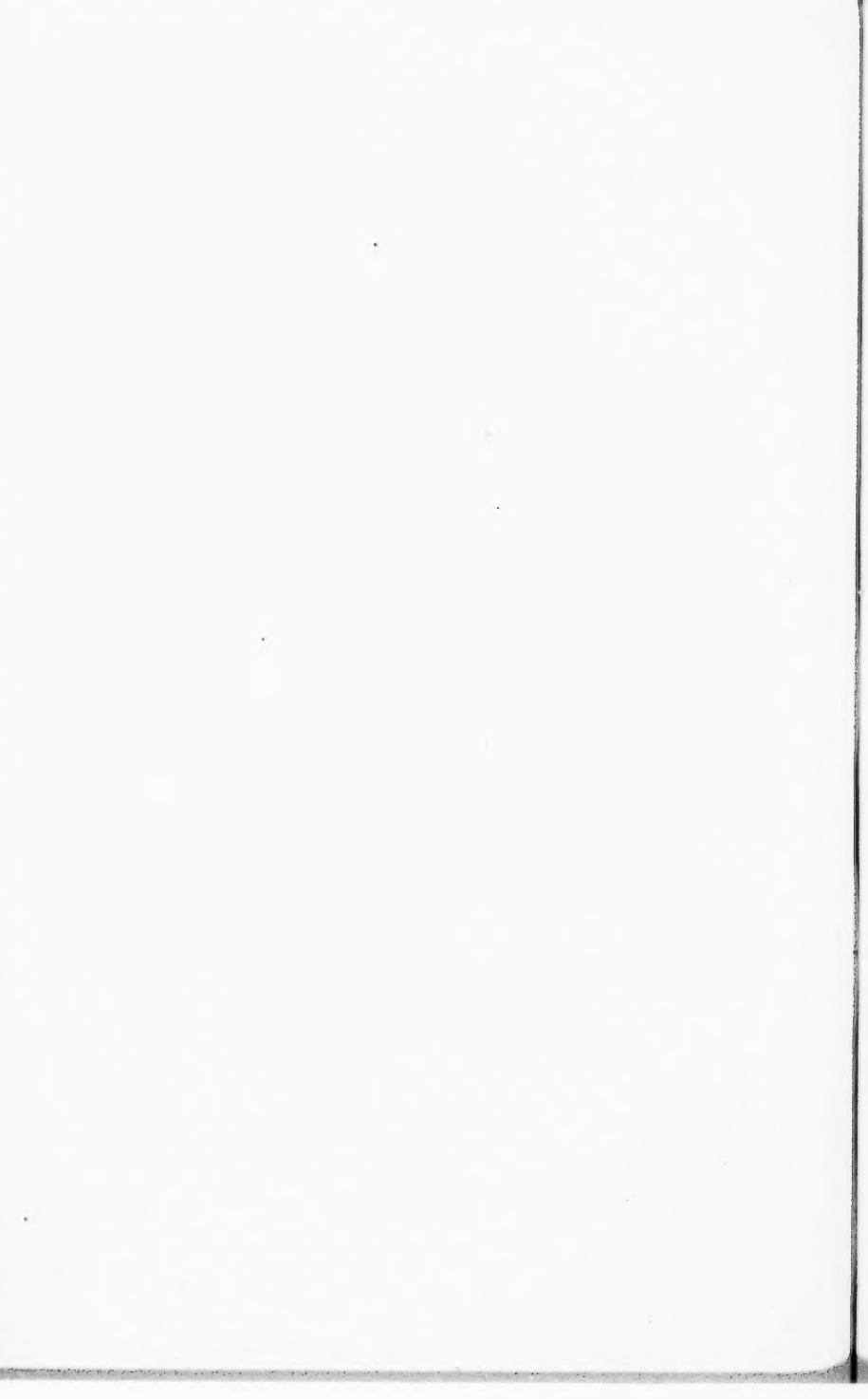
		In hands of the public.
Act March 30, 1871	\$15,281,970 47	
" " " " held by Com.		
" " " " sinking fund..	2,026,439 39	
" " " " literary fund.	552,079 29	
	<u>\$2,578,518 68</u>	
Act March 28, 1879		\$12,703,451 79
Act Feb. 14, 1882	\$1,775,603 48	564,258 87
Held by literary fund	166,943 33	
		<u>1,608,660 15</u>
Act Feb. 20, 1892		605,320 78
		<u>15,481,691 59</u>
Total amount in the hands of the public.....	\$15,481,691 59	
Total amount held by the Com. S. fund.....	2,026,439 39	
Total amount held by the literary fund.....	719,022 62	
	<u>\$18,227,153 60</u>	
Total amount of W. Va. script issued.....	\$18,227,153 60	
In hands of public	\$15,481,691 59	
Held by State of Virginia	2,745,462 01	
	<u>\$18,227,153 60</u>	
Total issue of W. Va. script.....	\$18,227,153 60	

I hereby certify that the above statement correctly sets forth the amount of West Virginia certificates, issued by Virginia in funding her old obligations, as shown by the books of this office.

(Signed)

JNO. G. DEW,

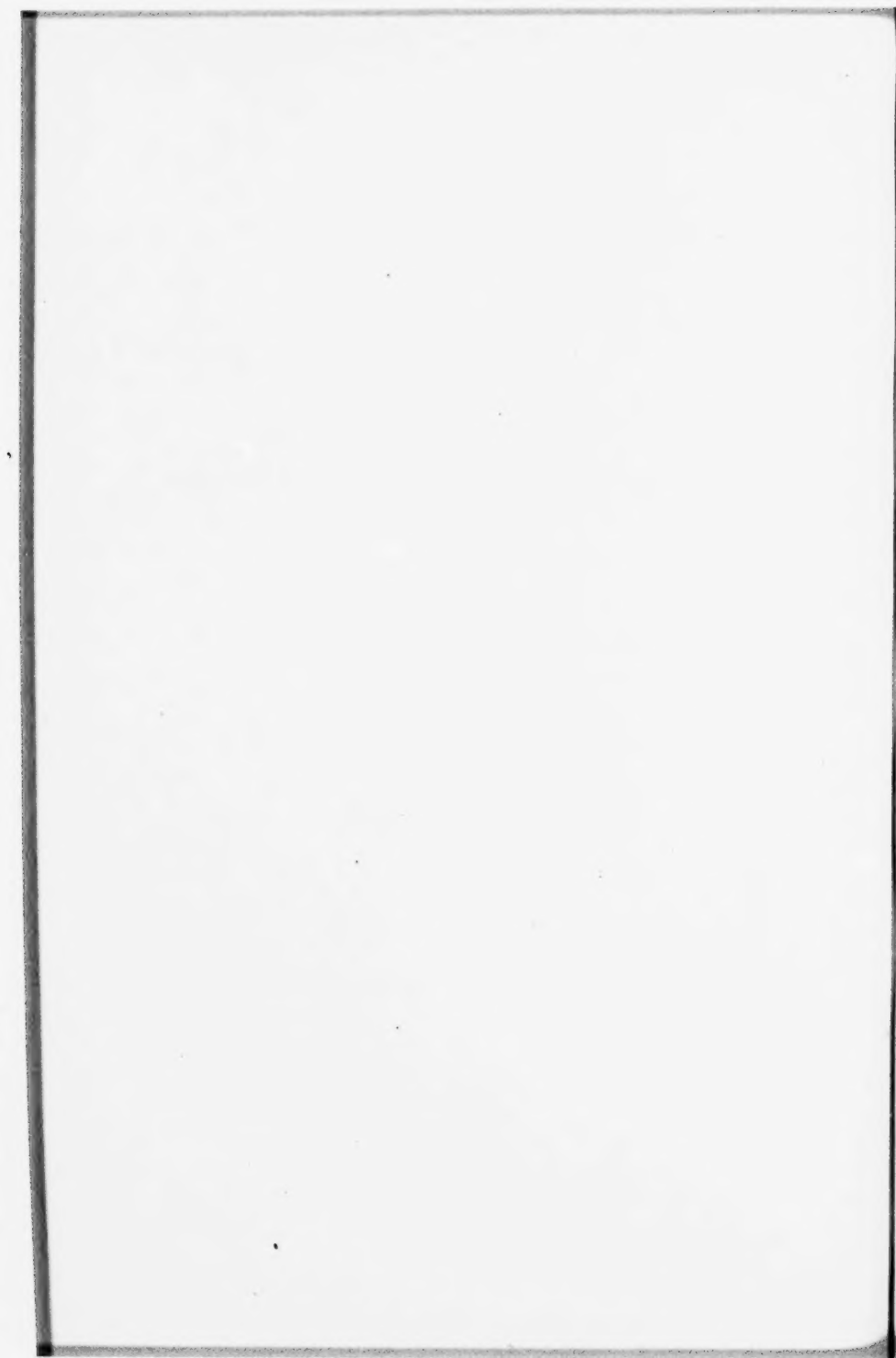
Second Auditor of Virginia.



Supreme Court of the United States.

OCTOBER TERM, 1906.

DEMURRER



IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

ORIGINAL NO. 7.

Commonwealth of Virginia

vs.)

State of West Virginia.

*To the Honorable, the Chief Justice and the Associate Justices of
the Supreme Court of the United States:*

Your petitioner, the State of West Virginia, one of the United States of America, by William M. O. Dawson, Governor, and Clarke W. May, Attorney General, humbly prays leave to file the sworn demurrer herewith presented, to the bill of complaint in the above entitled cause.

It is humbly submitted that, by an examination of the bill of complaint in this cause, it will be observed that there is nothing in said bill contained showing a controversy between said Commonwealth of Virginia and said State of West Virginia justifiable in this court.

Wherefore, your petitioner humbly prays leave to file her said demurrer, and that a day may be fixed by your Honors for the hearing of the same.

And as in duty bound your petitioner will ever pray.

Governor of West Virginia.

Attorney General of West Virginia.

Counsel.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

ORIGINAL NO. 7.

COMMONWEALTH OF VIRGINIA

vs.)

STATE OF WEST VIRGINIA.

The demurrer of the State of West Virginia, defendant above named, by William M. O. Dawson, Governor, and Clarke W. May, Attorney General of said State of West Virginia, to the bill of complaint of the Commonwealth of Virginia, complainant, by William A. Anderson, Attorney General of said Commonwealth of Virginia.

The defendant, the State of West Virginia, above named, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true in such manner and form as the same are set forth and alleged, or in any way or manner, demurs thereto, and for the cause of demurrer shows:

First: The jurisdiction of this Court does not extend to the character of demands, alleged in the bill in this cause, being in substance simple demands for money, and this Court could not enforce a judgment for money against one of the sovereign states of the Union of the United States in any way or manner.

Second: The bill on its face shows that the said Commonwealth of Virginia has no suable interest in the demands for money set out therein which would entitle her to the relief prayed for therein, and that the said demands if recovered would be only for the benefit of certain individuals, who are the holders of the alleged evidences of debt mentioned in said bill.

Third: The bill on its face shows that so far as said Commonwealth of Virginia may have any ownership of any of such alleged evidences of debt, the acts of the Legislature of said Commonwealth, claimed by the said Attorney General thereof as authority to institute this cause, do not in fact authorize any suit therefor to be instituted, but only authorizes, if any authority at all is given, action on the part of the Commission in said bill mentioned and said Attorney General for the benefit and at the expense of the individuals in the bill and exhibits called "Certificate holders," which is in effect giving the use of the name of said Commonwealth

to such "Certificate holders" for the purpose of attempting to collect their alleged private money demands against said State of West Virginia.

Fourth: The said bill does not sufficiently and definitely set out therein the alleged demands for money claimed therein, so that a complete and proper answer can be made thereto.

Wherefore, and for divers other good causes of demurrer in the said bill, this defendant demurs thereto and humbly demands the judgment of this Court whether she shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with her costs and charges in the matter most wrongfully sustained.

Governor of West Virginia.

Attorney General of West Virginia.

State of West Virginia,

County of Kanawha, ss.

This day there personally appeared before me, the undersigned Clerk of the Supreme Court of Appeals of the State of West Virginia, William M. O. Dawson, Governor of said State, and Clarke W. May, Attorney General of said State, representing the said State of West Virginia, the defendant in the above entitled cause, and whose names as such are signed to the foregoing demurrer, and being by me duly sworn, say that they are respectively the officers of the defendant, the said State of West Virginia, as above set out, and that the foregoing demurrer is not interposed for delay and that the same is true in point of fact.

Given under my hand as Clerk of said Court and the official seal thereof ——— day of October, 1906.

*Clerk of the Supreme Court of Appeals
of the State of West Virginia.*

I, Clarke W. May, Attorney General of the State of West Virginia, hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

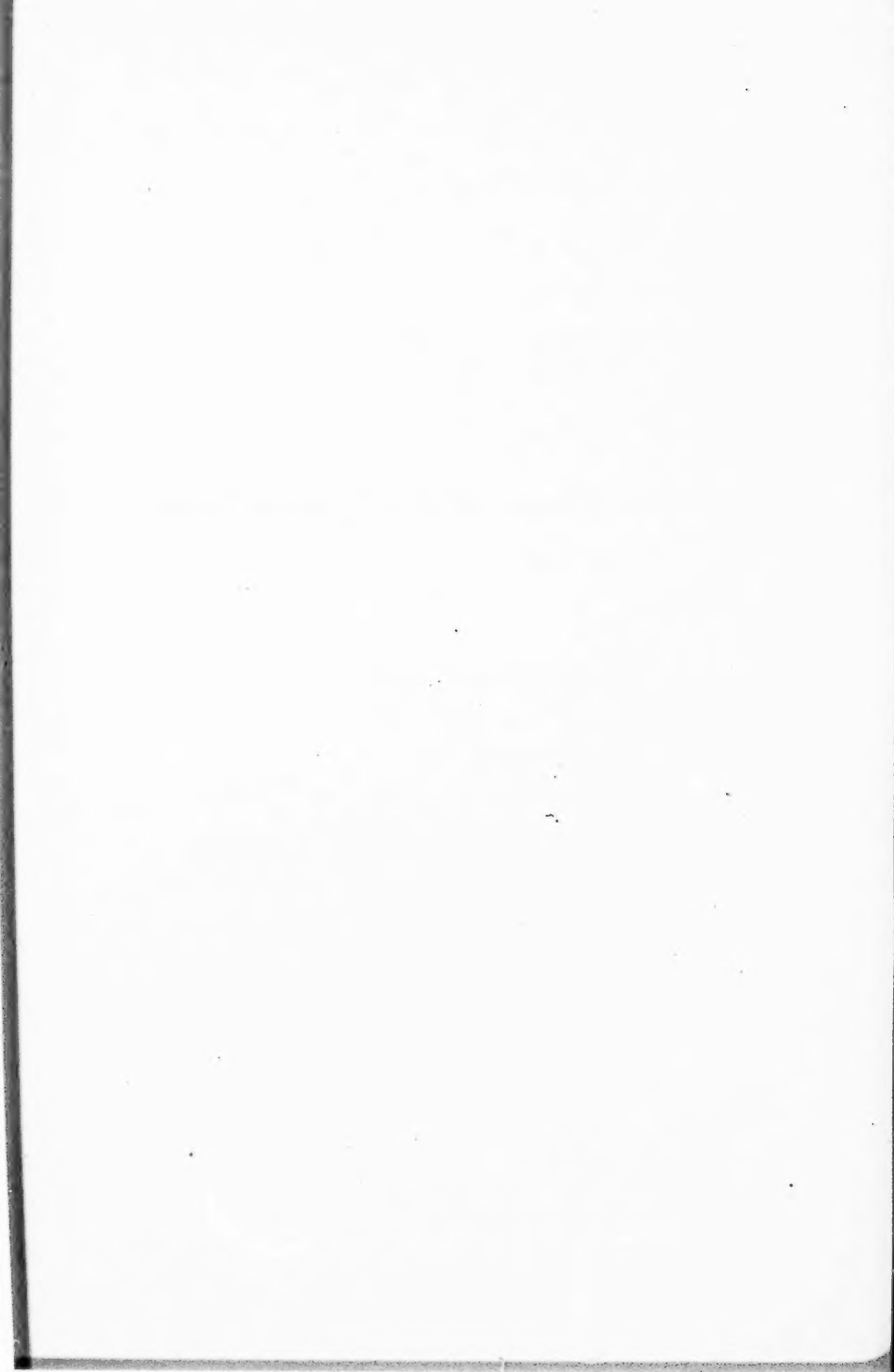
Attorney General of West Virginia.



Supreme Court of the United States.

OCTOBER TERM, 1906.

AMENDED DEMURRER.



IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

Original No. 7.

COMMONWEALTH OF VIRGINIA.

vs.

STATE OF WEST VIRGINIA.

AMENDED DEMURRER.

The defendant, The State of West Virginia, by William M. O. Dawson, Governor, and Clarke W. May, Attorney General, of said State, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true in manner and form as the same are set forth and alleged, or in any way or manner, presents this amended demurrer thereto, and for cause of demurrer shows:

First. That it appears by said bill that there is a misjoinder of parties plaintiff and a misjoinder of causes of action. The said bill is brought by the Commonwealth of Virginia to recover debts alleged to be due to her in her own right from the defendant for property and money alleged to have been transferred and delivered to the defendant under certain acts of the legislature passed in 1863, and also, as trustee for the owners of certain certificates mentioned and described in said bill, to have an accounting to ascertain and declare the amount claimed to be due from the defendant as her just proportion of the public debt of the plaintiff prior to the first day of January, 1861.

Second. That this court has no jurisdiction of either the parties to or the subject-matter of this action, because it appears by the said bill that the matters therein set forth do not constitute, within the meaning of the Constitution of the United States, such a controversy, or such controversies, between the Commonwealth of Virginia and the State of West Virginia as can be heard and determined in this court, and this court has no power to render or enforce any final judgment or decree thereon.

Third. That it appears by said bill that the plaintiff herein sues as trustee for the benefit of a number of individuals who

are the alleged owners of certain certificates in the said bill set forth and described.

Fourth. That the said bill does not state facts sufficient to entitle the Commonwealth of Virginia to the relief prayed for, or to any relief, either in her own right or as trustee for the owners of the certificates therein set forth and described.

Fifth. That it does not appear by said bill that the Attorney General has ever been authorized to institute and prosecute this suit in the name of the Commonwealth of Virginia in her own right, but only as trustee for the use and benefit of the owners of certain certificates mentioned in the act of March 6, 1900, which is referred to and made part of said bill.

Sixth. That the said bill does not sufficiently and definitely set forth the claims and demands relied upon, but the allegations thereof are so indefinite and uncertain that no proper answer can be made thereto.

Seventh. That the allegations in the said bill are not sufficient to entitle the plaintiff therein, either in her own right or as trustee, to an account or to a discovery from this defendant.

Eighth. That the said bill does not contain any prayer for a judgment or decree or any other final relief against this defendant.

Wherefore, and for divers other good causes of demurrer in the said bill, this defendant demurs thereto and humbly demands the judgment of this court whether she shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with her costs and charges in the matter most wrongfully sustained.

W. M. O. DAWSON,
Governor of West Virginia.

CLARKE W. MAY,
Attorney General of West Virginia.

State of West Virginia,

County of Kanawha, ss:

This day there personally appeared before me, the undersigned, clerk of the Supreme Court of Appeals of the State of West Virginia, William M. O. Dawson, Governor of said State, and Clarke W. May, Attorney General of said State, representing the said State of West Virginia, the defendant in the above entitled cause, and whose names as such are signed to the foregoing amended demurrer, and, being by me duly sworn, say that they are respectively the officers of the defendant, the said State of West Virginia, as above set out, and that the foregoing amended demurrer is not interposed for delay and that the same is true in point of fact.

Given under my hand as clerk of said court and the official seal thereof this 23rd day of February, 1907.

WM B. MATHEWS,
*Clerk of the Supreme Court of Appeals
of the State of West Virginia.*

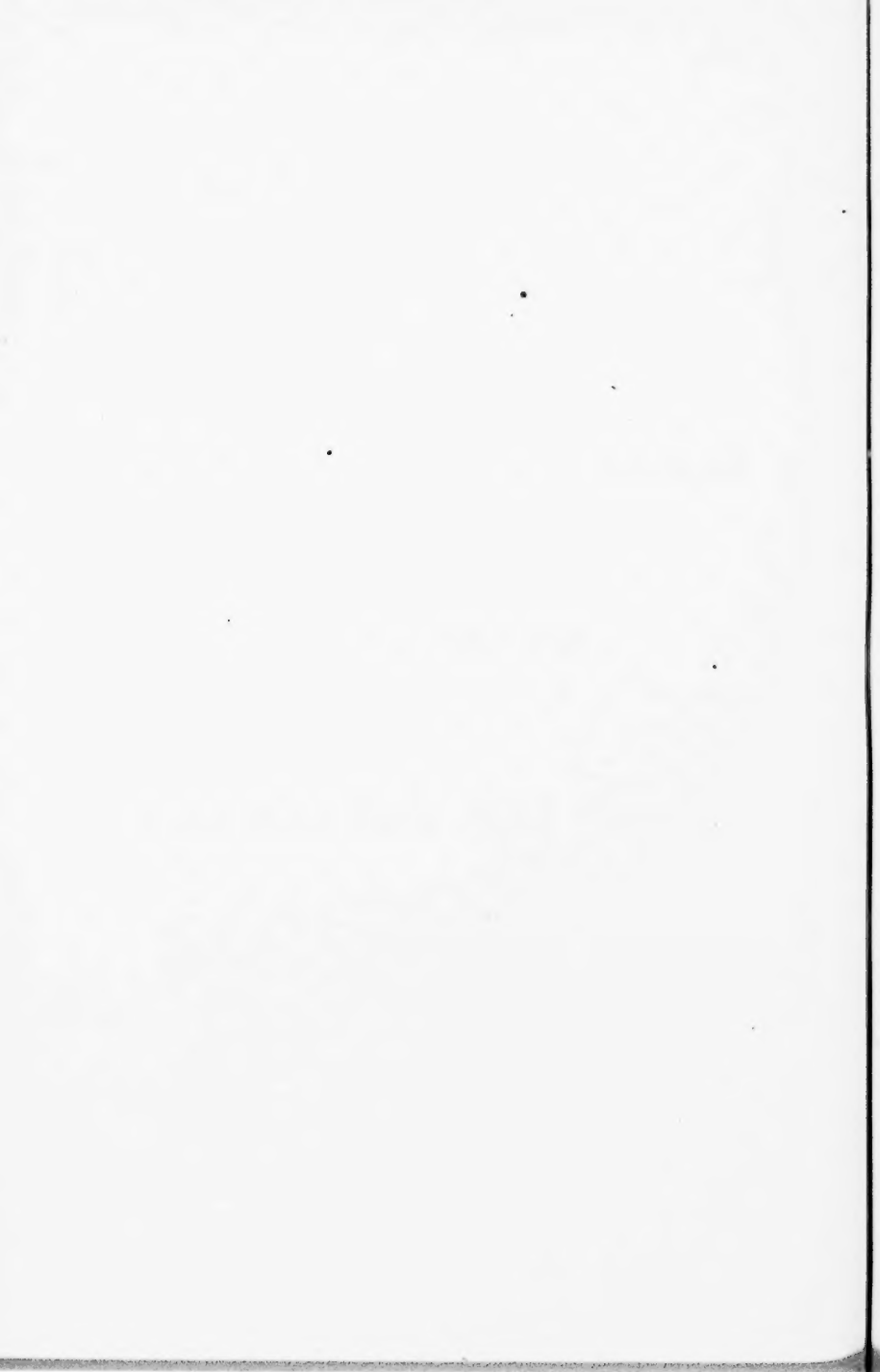
I, Clarke W. May, Attorney General of the State of West Virginia, hereby certify that in my opinion the foregoing amended demurrer is well founded in point of law.

CLARKE W. MAY,
Attorney General of West Virginia.

Supreme Court of the United States.

OCTOBER TERM, 1906.

BRIEF FOR DEFENDANT.



IN THE SUPREME COURT OF THE UNITED STATES.

COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

BRIEF FOR THE DEFENDANT.

STATEMENT OF THE CASE UPON DEMURRER.

On January first, 1861, Virginia was indebted on account of the issuance of bonds at various times prior thereto in the aggregate amount of \$31,800,712.90, upon which past due interest including the interest maturing on that date amounted to \$1,045,183.01.

On July first, 1863, a date ten days subsequently to the admission of West Virginia as a State into the Union, the bill shows a public indebtedness of the plaintiff, including principal of said bonds and the interest accrued and unpaid thereon, amounting in the aggregate to \$39,098,922.00. Of this sum, \$5,954,716.08 is interest, and the residue, \$33,141,212.92, is principal, representing the entire indebtedness against the State of Virginia at the time of the formation and admission into the Union of West Virginia. This indebtedness was held by private owners of bonds which Virginia had issued and sold upon her own account.

In 1871 the Legislature of Virginia passed an act providing for the funding and payment of her public debt, in which, among other things, there is recited that the people of Virginia being anxious for the prompt liquidation of her portion of the said debt, which was estimated by said act to be two-thirds of the entire indebtedness incurred by the State of Virginia, and also suggesting that the authorities of West Virginia might prefer to pay that State's portion of the said indebtedness to the holders thereof, and to enable the State of West Virginia to settle her portion of the said debt with the holders thereof, allotted to West Virginia by her own *ex parte* and *gratuitous* act the payment of the other third of said debt. The act provides for the surrender of the old and

the acceptance of the new bonds of Virginia for two-thirds of the amount of said aggregate indebtedness, and the issuance to the owners or holders of the other one-third of the amount due upon the old bonds, certificates bearing the same date as the new bonds representing the funded debt of Virginia, setting forth the form of the bond which is not funded, and the payment thereof to be provided for in accordance with such settlement as might thereafter be had between the States of Virginia and West Virginia.

In 1879 a further act was passed by the Legislature of Virginia regarding her said debt, which provides, among other things, for the issuance of certificates on West Virginia to the holders of the old bonds who had not already received such certificates, and that the State of Virginia would aid the holders of certificates issued by Virginia, in negotiating with the State of West Virginia for an amicable settlement of all the claims of such creditors holding the certificates issued by Virginia against the State of West Virginia, and that the acceptance of such certificates for West Virginia's one-third issued under the acts of the Legislature of Virginia, should be taken and held as a full and absolute release of Virginia from all liability on account of said certificates.

In 1882 another act was passed by the Legislature for the express purpose of ascertaining and declaring Virginia's equitable share of the debt created before and actually existing at the time the State of West Virginia was formed, the design of which act was to make a full settlement of said debt, and thus present a true state of the account between Virginia and her creditors, which embodies a recital to that effect, and which provides for the issuance of certain certificates by the Commonwealth of Virginia, covering the one-third of her indebtedness claimed to be payable by the State of West Virginia, and there is recited in the form of said certificate that the Commonwealth of Virginia has discharged her equitable share of her debt evidenced by such certificate, leaving a balance with interest to be accounted for by the State of West Virginia, without recourse upon the Commonwealth of Virginia. These certificates were accordingly issued by Virginia and received and accepted by the holders of that part of the original debt represented by said certificates, all of the old bonds surrendered to the Commonwealth of Virginia and cancelled, and Virginia thereby relieved from all liability on her own account to the holders of the West Virginia deferred certificates.

The only obligation left upon Virginia after the issuance of these deferred certificates purporting to represent West Virginia's portion of the debt of Virginia gratuitously fixed *ex parte* by the State of Virginia, and accepted by the holders of that part of the original debt of Virginia in settlement thereof, was to use her offices and endeavors to effect payment thereof, or its adjustment in some way, by the State of West Virginia. By this arrangement, effected alone by the State of Virginia with her creditors, she was relieved from all substantial liability—in fact from any pecuniary liability—as to the one-third of her indebtedness created by her

prior to the formation and admission into the Union of the State of West Virginia.

This suit was instituted in part for the recovery of that portion of the debt of Virginia created prior to and existing on June 20, 1863, the date of the admission of West Virginia into the Union and is the gravamen of the complainant's bill.

Another claim asserted by said bill is an alleged indebtedness evidenced by the bonds of Virginia and other liabilities held by and due to the Commissioners of the Sinking Fund and the Literary Fund of said State, as created under her laws, amounting, the former to \$1,462,993.00, and the latter to \$1,543,669.00, as of the date of January first, 1861.

This cannot be treated as a debt within the meaning of that term to be asserted against the State of West Virginia, because these Commissioners were simply agents for the management and control of a part of the internal fiscal affairs of the Commonwealth of Virginia, and the use of which was and is available only to the State of Virginia for the advancement of her own peculiar State interests.

Another and further claim made by the said bill is for the collection or payment for all property, real, personal and mixed, owned by or appertaining to the said State of Virginia, and being within the boundaries of the State of West Virginia, which passed to and became the property of the latter State, and was taken and appropriated to her own use by the State under the provisions of an act passed by the State of Virginia, in February, 1863, the bill alleging that the property passing to the State of West Virginia under and by virtue of the said act, consisted of a number of items alleged to amount in the aggregate to several millions of dollars, the exact amount of which complaint, it is alleged, is unable to definitely ascertain and state.

These three classes of claims made by the complainant in her bill constitute the sum total of the demand made by her against the defendant in this suit.

The first effort of Virginia to fund her said debt was the Act of the General Assembly approved March 30, 1871, in which she declared her portion thereof to be two-thirds, and provided a plan for its funding and payment, and as to the residue thereof this Act declares:

"Upon the surrender of the old and the acceptance of the new bond for two-thirds of the amount due as provided in the last preceding section, there shall be issued to the owner or owners, for the other one-third of the amount due upon the old bond, stock or certificate of indebtedness so surrendered, a certificate bearing the same date as the new bond, setting forth the amount of the bond which is not funded as provided in the last preceding section, and that payment of said amount with interest thereon at the rate prescribed in the bond surrendered, will be provided for in

accordance with such settlement as shall hereafter be had between the States of Virginia and West Virginia in regard to the public debt of the State of Virginia existing at the time of its dismemberment, and that the State of Virginia holds said bonds, so far as unfunded, in trust for the holder or his assignees; and provided further, that until such final settlement with West Virginia, there shall be paid upon what are known as sterling bonds, in the manner now prescribed by law, two-thirds of the interest accruing on the principal of said bonds, after July first, eighteen hundred and seventy-one, and for the interest accrued to said date certificates dated on that day shall be issued, drawing the same rate of interest as the bonds, two-thirds of which shall be paid as provided to be paid on the bonds. The remaining one-third of unpaid interest, both on the bonds and certificates, shall be payable in money, and the principal of said certificates in new sterling bonds of the same character as the old, in accordance with such final settlement as shall be made with West Virginia."

(Plaintiff's Bill, pp. 14, 15.)

Under the terms of this statute Virginia still remained liable for the payment of her entire debt including the one-third, unfunded, for which deferred payment certificates were to be issued, payable upon final settlement between Virginia and West Virginia.

The next effort of Virginia to adjust her bonded indebtedness created prior to the formation of West Virginia as a State, was the Act of her General Assembly, approved March 28, 1879, whereby she provided an abatement of the rate of interest and divided her then outstanding indebtedness into two classes, as follows:

"Class I, which shall be taken to include all tax-receivable coupon bonds, and all registered bonds and fractional certificates which are convertible under the act approved March thirtieth, eighteen hundred and seventy-one, into such tax-receivable coupon bonds.

"Class II, which shall be taken to include all bonds funded under the act approved March thirtieth, eighteen hundred and seventy-one, as amended by the act approved March seventh, eighteen hundred and seventy-two; and also two-thirds of the face value, with two-thirds of the unpaid accrued interest up to the first of July, eighteen hundred and seventy-one, on all unfunded bonds, including sterling bonds."

(Plaintiff's Bill, pp. 17, 18.)

This act also declares as to the liability of West Virginia touching the said indebtedness of the complainant, as follows:

"The owners of all classes of bonds mentioned in this act,

who shall exchange their securities for the bonds created under this act, and who shall not have yet received certificates representing the remaining one-third of their principal and interest, due and payable by the State of West Virginia, shall receive certificates of a like character to those issued under the act of March thirtieth, eighteen hundred and seventy-one, when they make such exchange, and the State of Virginia will negotiate or aid the creditors holding all of such certificates issued, under this act, or previous acts, in negotiating with the State of West Virginia for an amicable settlement of the claims of such creditors against the State of West Virginia. The acceptance of the said certificates for West Virginia's one-third, issued under this act, shall be taken and held as a full and absolute release of the State of Virginia from all liability on account of said certificates."

(Plaintiff's Bill, p. 19.)

Under these acts of the Legislature of Virginia, nearly if not quite all of her said indebtedness was funded on the basis prescribed by these enactments, thus relieving her of all liability upon the one-third part of her original ante-bellum obligations.

A third expression of Virginia touching her said debt, so far as the same relates to West Virginia, is that embraced in an Act of her Legislature approved February 14, 1882, which is entitled as follows:

"An act to ascertain and declare Virginia's equitable share of the debt created before and actually existing at the time of the partition of her territory and resources and to provide for the issuance of bonds covering the same, and the regular and prompt payment of interest thereon."

(Plaintiff's Bill, p. 21.)

This act contains an extended preamble setting forth what purports to be an account between the state and her creditors, showing the aggregate of principal and interest in two distinct totals in separate columns, declaring the assumption of two-thirds thereof as her equitable portion, fixing the total amount of this equitable portion as of July 1st, 1882, at \$21,035,377.15, and then provides for the funding of this debt by the issuance of bonds drawing interest at the rate of three per cent.

This act also further provides as follows:

"For all balances of such indebtedness, constituting West Virginia's share of the old debt, principal and interest, in the settlement of Virginia's equitable share as aforesaid, the said board of sinking fund commissioners shall issue a certificate, as follows:

"No.

"The Commonwealth of Virginia has this day discharged

her equitable share of the (registered or coupon, as the case may be) bond for dollars, held by dated the day of, and numbered, leaving a balance of dollars, with interest from, to be accounted for by the State of West Virginia, without recourse upon this Commonwealth.

"Done at the capitol of the State of Virginia, this day of eighteen

"....., *Second Auditor.*

"....., *Treasurer.*"

(Plaintiff's Bill, pp. 28, 29.)

A further act of the General Assembly of Virginia was passed, approved February 20, 1892, which bears the following title:

"An act to provide for the settlement of the public debt of Virginia not funded under the provisions of an act entitled an act to ascertain and declare Virginia's equitable share of the debt created before and actually existing at the time of the partition of her territory and resources, and to provide for the issuance of bonds covering the same, and the regular and prompt payment of the interest thereon, approved February 14, 1882."

(Plaintiff's Bill, p. 31.)

This act provided for the issuance of nineteen millions of dollars in bonds in lieu of twenty-eight million dollars of outstanding obligations of Virginia, not funded under the act approved February 14, 1882, hereinbefore mentioned, and prescribed the form of the new bonds to be issued under this act and the coupons thereof.

This act also provides that in taking up these outstanding bonds before issuing new bonds in lieu thereof there shall be deducted "one third of the principal and interest of such obligations as were issued prior to the thirtieth day of March, eighteen hundred and seventy-one, and also deducting one-third of the principal and interest of such obligations as are issued under the act approved the thirtieth day of March, eighteen hundred and seventy-one, as do include West Virginia's portion."

This act further provides as follows:

"For all balances of the indebtedness, constituting West Virginia's share of the old debt, principal and interest, in the settlement of Virginia's equitable share of the bonds authorized to be exchanged under this act, the said share having been heretofore determined by the commonwealth of Virginia, the said commissioners shall issue certificates substantially in the following form, viz:

"No. The Commonwealth of Virginia has this day discharged her equitable share of the (registered or

coupon, as the case may be) bond fordollars, dated day of, and No....., leaving a balance of dollars with interest from to be accounted for to the holder of this certificate by the State of West Virginia, without recourse upon this Commonwealth.

"Done at the capitol of the State of Virginia, this day of, eighteen hundred and ninety-two.

"....., *Second Auditor.*

"....., *Treasurer.*"

(Plaintiff's Bill, pp. 35, 36.)

By virtue of this act of legislation Virginia made a further considerable reduction of the principal of her debt and received a more favorable rate of interest and better terms as to its payment.

After the lapse of about two years from the approval of the act last named a joint resolution was adopted by the legislature of Virginia, entitled as follows:

"A joint resolution to provide for adjusting with the State of West Virginia the proportion of the public debt of the original State of Virginia proper to be borne by West Virginia, for the application of whatever may be received from West Virginia to the payment of those found to be entitled to the same."

(Plaintiff's Bill, p. 39.)

This resolution was approved March 6, 1894, and in its preamble refers to the acts by their titles, passed by the General Assembly of Virginia relating to her debt, concluding the preamble of this resolution as follows:

"Whereas the present State of Virginia has settled and adjusted, to the entire satisfaction of her people and the creditors, the liability assumed by her on account of two-thirds of the debt of the original state."

(Plaintiff's Bill, p. 40.)

The resolution then creates a commission "authorized and directed to negotiate with the State of West Virginia a settlement and adjustment of the proportion of the public debt of the original state of Virginia proper to be borne by West Virginia."

"But said commission shall not proceed with said negotiation until assurances satisfactory to the commission shall have been received from the holders of a majority in amount of said certificates, exclusive of those held by the state through the agency of the board of education and sink-

ing fund commissioners, that they desire the said commission to enter into and undertake such negotiation, and will accept the amount so ascertained to be paid by the State of West Virginia in full settlement of the one-third of the debt of the original State of Virginia which has not been assumed by the present State of Virginia. But said commission shall in no event enter into any negotiation hereunder except upon the basis that Virginia is bound only for the two-thirds of the debt of the original state which she has already provided for as her equitable proportion thereof.

"All expenses incurred by said commission and said board of arbitrators, including reasonable compensation of the members thereof, shall be paid out of the proceeds of such settlement or by the holders of said certificates who are the beneficiaries of such settlement, but without subjecting the state to any expense on this account."

(Plaintiff's Bill, pp. 40, 41.)

A further act was passed by the Virginia legislature, approved March 6, 1900, reciting the previous acts of said legislature relating to the public debt of said state, and also reciting that,

"Whereas in each of said acts provision is made for issuing to creditors of the original State of Virginia who should accept the new bonds provided for by said several acts, certificates for such proportion of the obligation surrendered by them as was deemed proper to be borne by the State of West Virginia, to wit: One-third of the amount of said obligations, of which certificates this state holds a large amount, through the agency of the commissioners of its sinking fund and literary fund, and * * *

"Whereas, it appears that while Virginia has satisfactorily settled the two-thirds of the original debt which she assumed, yet it is possible that complications will arise with respect to said certificates which will render it desirable that she should endeavor to secure an adjustment thereof upon terms which will protect herself, but will work no injustice to West Virginia, and thus finally dispose of the only question remaining unsettled in connection with said debt * * * and take upon deposit the certificates aforesaid, or have the same otherwise held or placed on deposit subject to their control upon an agreement and contract on the part of the holders of said certificates that if the said commission will secure a settlement with West Virginia with respect to said certificates the holders of said certificates so deposited will accept the amount realized on such settlement from West Virginia on said certificates as a full settlement of all their claims thereunder. If at least two-thirds in amount of said certificates issued under the act of eighteen

hundred and seventy-one, exclusive of those held by the State through the agency of the board of education and sinking fund commissioners, and at least a majority in amount of all the other certificates aforesaid shall be deposited or placed subject to the control of the said commission upon the agreement and contract aforesaid, then the said commission shall be authorized and empowered by and with the advice and approval of the attorney general of Virginia, to take such action and institute such proceedings on behalf of the state as may, in the judgment of said commission and attorney general, be needful and proper to protect the interest of the state and bring about and carry into effect a settlement as aforesaid. All the expenses involved in connection with any of the matters aforesaid shall be borne by the certificate holders, as provided in the joint resolution aforesaid, and the state shall not be subject to any expense on that account."

(Plaintiff's Bill, pp. 41, 42.)

In accordance with the provisions and requirements of said act approved March 6, 1900, said commission entered into an arrangement with the duly authorized representatives of the holders of the deferred certificates issued by Virginia, without recourse upon her and received by her creditors in settlement of one-third of the original debt, whereby said commission reduced to its possession and control more than five-sixths of the entire amount of these certificates outstanding and the said commission now holds said certificates in trust for the present owners thereof, the amount of which certificates has, no doubt, largely increased since the institution of this suit, as indicated by a statement contained in the report of said commission submitted to the General Assembly of Virginia, thus placing in the possession of said commission nearly or quite all of said certificates.

The ownership of these certificates held by said commission is still in the original holders of the old debt of Virginia, and their possession by said commission is solely for the purpose of giving color to the institution of a suit in this court by the state to promote the collection of an alleged debt payable—not to the plaintiff—but to various private persons represented by the committee who assembled these certificates and turned them over to the said commission.

That this is the extent of the interest which the said commission created by the State of Virginia has in the said certificates, a demand for the payment of which constitutes the gravamen of the bill filed in this suit, is clearly apparent from the agreement entered into between the said commission and the committee representing the holders of said certificates, and the parts of said agreement relating to this feature of the case are here copied and are as follows:

“The said Virginia commission hereby stipulate and agree by and with the advice and approval of the attorney general of Virginia, that, in their judgment, it is needful and proper, in order to protect the interests of the state and bring about and carry into effect a settlement in the premises, that a suit should be instituted in the name of the State of Virginia against the State of West Virginia in the Supreme Court of the United States, asking for an adjudication and settlement by that court of the matters aforesaid unsettled and undetermined between the two states, arising and growing out of the debt of the original State of Virginia before its dismemberment and on account of which said deferred certificates were issued, the same to be brought and instituted as provided in the act of the General Assembly of Virginia of March 6, 1900, referred to in the said contract of December 14, 1904; and the said Virginia commission acting by and with the advice and approval of the attorney general of that state, do hereby undertake and agree that such a suit shall be brought against the State of West Virginia for the purpose of obtaining a settlement as aforesaid, as soon as the pleadings, papers and documents relating thereto can be conveniently and properly drawn up and prepared for presentation to the said court, which said suit shall be instituted, conducted and proceeded with in all respects in accordance with the provisions of the said act of the General Assembly of Virginia and the joint resolution of the General Assembly of March 6, 1894, also referred to in said contract of December 14, 1904; but the power to make and carry into effect a settlement and adjustment in the premises by agreement with West Virginia, as to the deferred certificates placed subject to the control of the commission as aforesaid, as provided in the previous contracts aforesaid, shall remain vested in the said commission, notwithstanding the institution and pendency of such suit.

“And the Virginia commission do further undertake and agree that, in accordance with the terms and conditions of the said joint resolution and Act of the General Assembly of Virginia, they will account for, pay over and deliver such amount, either in cash or securities, as may be realized from West Virginia through any settlement made by the said commission with that State, either by means of an adjudication or a recovery in said suit or otherwise, for or on account of the deferred certificates now or hereafter deposited and placed subject to their control as aforesaid, to the said Depositing Committee in full settlement and satisfaction of all claims under said certificates; and the said Depositing Committee agree on behalf of the depositors of said deferred certificates so placed to the control of the said commission and on behalf of those entitled to the benefit of said certifi-

cates as assignees of said depositors or otherwise to accept as aforesaid such amount, either in cash or securities, as may be determined or ascertained in any such suit to be due by, or as may be realized through any adjustment or settlement as aforesaid from the State of West Virginia on account of the said certificates, and on account of the bonds represented by and mentioned in the said certificates respectively, in full settlement and satisfaction of all claims on account of said certificates and on account of the bonds therein mentioned, and to accept and take such adjudication against the State of West Virginia in full discharge and acquittance of all claims in the premises against the State of Virginia.

"It is further understood and agreed that if from any cause the said commission shall fail or be unable to bring about such adjustment or settlement, or to obtain a determination or ascertainment of the liability of West Virginia as hereinbefore provided for, then it shall be the duty of the said commission to restore to the control of the said Depositing Committee all such deferred certificates as may have been placed subject to the control and disposal of the said commission as aforesaid."

(Plaintiff's Bill, pp. 84-86.)

We have thus given in brief outlines the material facts appearing upon the face of the record of the bill and its exhibits, and which declare the true and legal status of this suit at its very threshold.

The Propositions Raised by the Demurrer.

The case as made by the bill and its exhibits presents several vital points for consideration arising upon the demurrer interposed by the defendant, which may be thus particularized:

I. Is this a controversy between two states within the meaning of section 2, art. 3 of the Constitution?

II. Does the complainant have such an interest in the subject matter of litigation or in the result thereof, so far as the deferred certificates are concerned, as to give her standing in a court of equity?

III: Have not the real owners of these certificates such a substantial interest and right of ownership therein as to make them indispensable parties, and whose presence would oust the court of jurisdiction in respect to this feature of the bill?

IV. Does the fact that the commissioners of the Sinking Fund and Literary Fund of Virginia have in their possession certain small portions of these certificates thus issued by the plaintiff to herself give her any cause of action against the defendant in respect thereto?

V. Does the claim for property transferred by the plaintiff to the defendant contained within the boundaries of the territory out of which West Virginia was erected into an independent state, ere-

ate any right of action on the part of Virginia against her for the value of this property?

VI. If this does afford the plaintiff a cause of action must it not be asserted at law, and not in a court of equity?

VII. Does the bill disclose any authority from Virginia directing a suit for the recovery of the value of property transferred by her and used by the defendant?

Relation of Virginia to the Old Debt.

In determining whether the bill and its exhibits present a controversy between two states within the meaning of section 2, article 3, of the Constitution, the relation of Virginia to her old debt will not be overlooked. Before the formation of West Virginia it must be conceded that Virginia was morally and legally bound for the whole debt which she had created by the issuance and sale of her bonds. At that time her entire territory was intact and all her resources unimpaired, in so far as they were not affected by the ravages of war, for which, of course, her creditors were not responsible.

In 1862, of her own accord, she parted with a portion of her territory, and gave her free consent to the creation of a new and independent state out of the territory by her thus surrendered. This, however, did not impair her liability upon this debt, nor any part thereof, to her creditors holding the bonds which she had issued, or in any manner lessen her obligation for their payment.

This must be conceded upon the well recognized principles of international law.

Higginbotham v. The Commonwealth, 25 Gratt (Va.) 627.

Taylor, Int. Pub. Law, pp. 203, 204, Sec. 166.

Halleck, Int. Law Vol. 1, p. 76.

Hall, Int. Law, Sec. 27.

Mr. Taylor in his recent and very able and clear treatment of the effect of a dismemberment of a state upon its obligations, presents the subject in two aspects: First, when a portion of its territory and population have been taken by conquest to form an integral part of another state; second, when the severed territory is erected into a new and independent state. We are interested in the latter feature of the subject, upon which this distinguished author says:

“A narrower and more technical rule prevails when the parent state is deprived of a portion of its territory which is erected into an entirely distinct political community. The cogent reason in such case is that as a man who loses an arm or leg in battle is not thereby relieved of any part of his obligations, so a state that is so dismembered as to suffer no loss of identity remains bound as before for its entire general indebtedness. ‘Such a change,’ says Halleck, ‘no more

affects its rights and duties than a change in its internal organization, or in the person of its rulers. This doctrine applies to debts due to as well as from the state, and to its rights of property and treaty obligations, except so far as such obligations may have particular reference to the revolted or dismembered territory or province.' In other words, as the old state continues its corporate life without interruption, it retains all general state property, and all general benefits resulting from treaties, with full liability for all general obligations with which the new creation taken from its side may disavow all legal connection."

The high moral obligation and legal duty on her part to meet her indebtedness still remained, with the right to treat, upon terms fair and just, with her creditors, for its adjustment and settlement. Accordingly, therefore, Virginia proposed to treat with her creditors with reference to the debt she had contracted, and submitted to them through her legislative department a proposition for its adjustment and ultimate liquidation. The terms of settlement were those which she herself proposed, and were met by her creditors in a broad spirit of liberality and compromise.

As the basis of settlement Virginia offered to pay two-thirds of her old or original debt by the issuance of new bonds by her, resting this proposition upon the consideration that one-third of her territory had passed to the new state after the debt had been contracted, proposing to issue contemporaneously with such new bonds certificates payable by West Virginia, for the other third of the debt, which Virginia did not feel inclined to pay for the reason just stated, and these certificates were accepted by the creditors without recourse upon Virginia, in payment or settlement of this one-third of her debt, thereby releasing Virginia from the payment of the one-third of her old original debt.

Thus Virginia adjusted and settled her former indebtedness contracted prior to June 20, 1863, on the basis and upon the terms fixed by herself and by negotiations to which she and her creditors alone were parties.

As a part of the consideration of this settlement with her creditors, Virginia agreed to aid them in collecting these certificates from West Virginia, amicably if she could, but by an action if necessary.

By this composition with her creditors Virginia extinguished her old debt—the one for any part of which West Virginia was, or could have been made, liable to the owners or holders thereof—and created a new debt of her own, in the creation of which West Virginia had no part or agency.

This new debt Virginia herself recognizes as her own, for which she alone is liable, and does not by this suit, or in any other manner, seek to make West Virginia liable, or for any part thereof.

This new debt, founded upon the consideration of a liability attaching to the old one, constitutes a valid and subsisting obligation

of Virginia, and her promise to aid the holders of the certificates issued by her against West Virginia is a mere collateral agreement, and does not add to or detract from the validity of the new debt.

Thus it will be perceived that Virginia has discharged her obligation to her creditors arising from the debt which she contracted before the division of her territory, and in that debt she is no longer interested pecuniarily, and that the only persons who are so interested are the owners of the certificates representing the one-third of the original debt.

The only claim which the holders of these certificates have upon Virginia, so far as these certificates are concerned, rests upon her promise to aid in their collection, which is but collateral, and can only be construed to mean that she will exert her moral influence to constrain West Virginia to recognize so much of the old debt as may be represented by the aggregate of these certificates.

The Status of West Virginia with Reference to the Old Debt of Virginia.

Initiatory to the formation of the new state, on August 20th, 1861, Virginia, through the convention which had restored the government of the State of Virginia, promulgated an ordinance to provide for the formation of a new state out of a portion of that state, in which, among other things, is the following declaration as to the debt of Virginia:

"The new state shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, 1861, to be ascertained by charging to it all the state expenditures within the limits thereof, and a just proportion of the ordinary expenses of the state government since any part of the said debt was contracted and deducting therefrom all the moneys paid into the treasury of the commonwealth from the counties included within the said new state during said period."

This is Virginia's own declaration made as aforesaid as to how West Virginia's part or share of the old debt shall be ascertained and determined. And if the same were obligatory, the means of reaching a proper conclusion on this basis have always been within the possession and exclusive control of Virginia. They are to be found in her own archives of state, which have at all times been in the custody of her own officers.

The Constitution of the new state at the time of her admission into the Union contained with reference to said debt, the following provision:

"An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this state, and the legislature shall ascertain the same as soon as may be practicable and provide for the liquidation thereof by a sinking fund sufficient

to pay the accruing interest and redeem the principal within thirty-four years."

The constitution containing this clause was framed and adopted subsequently to the adoption of the ordinance aforesaid by the State of Virginia.

The ordinance and legislation of Virginia looking to and providing for the erection of a new state out of a part of her own territory, were adopted and passed without the privity or consent of her creditors.

Then upon the division of the territory of Virginia, if the obligation of West Virginia, as claimed by some, to the creditors of Virginia became a joint liability as to which the two states were bound, and it appears to have been so regarded by Virginia, as the course she has pursued with reference thereto would seem to indicate, this suit as to said debt cannot be maintained.

Because, when the creditors of Virginia accepted new bonds in payment of the old bonds and surrendered the latter for cancellation and such cancellation was effected, all liability upon the part of West Virginia ceased and determined, and the issuance of certificates by the State of Virginia, mere *ex parte* memoranda, to be paid by West Virginia, was a mere gratuity which could not operate as a modus to give vitality to any part of the old debt which Virginia had fully discharged by her own composition with her creditors.

Here was an act of one claiming to be jointly liable with another whereby that one pays in new evidences of debt two-thirds of it, with an agreement of release as to the entire liability which must by the very act itself operate as a discharge of the other debtor. This must be the effect upon the well recognized principle of the law of contracts that the discharge of one joint obligor relieves the other from liability, in the absence of a valid stipulation to the contrary to which the parties in interest are privy.

It may be contended, however, that the principle here relied on does not apply to the transactions of sovereign states in matters of public concern. Nevertheless, when governments come into courts of justice for the determination of a controversy, they submit themselves to the ordinary rules of law which govern in such cases, and the same principles which would apply to private persons are also applicable to them. When they become suitors they no longer occupy the lofty attitude of sovereigns, so as to place themselves above and beyond the ordinary standards of right and wrong, but in the very nature and condition of things, these standards must be invoked or the courts themselves could not act as judicial tribunals.

If this were not so, the court's proceedings would necessarily be discretionary and capricious, without any established rules to govern their action. This is the principle which obtains and governs in cases of this character, even though the proceedings be by suit in equity.

United States *v.* Bank of the Metropolis, 15 Pet. 377; 10 L. ed. 774.

United States *v.* Flint, 4 Sawy., 42, Fed. Cas. No. 15,121.

United States *v.* Union Nat'l Bank, 10 Ben. 408, Fed. Cas. No. 16,597.

Rhode Island *v.* Massachusetts, 12 Pet. 657, 738, 743.

9 L. ed. 1233, 1266, 1267.

This is Not a Controversy Between Two States.

As already shown, Virginia has been released from the payment of one-third of her debt contracted before the formation of West Virginia, and has arranged for the payment of the two-thirds thereof by new bonds issued by her, and that she has no substantial interest in the third thereof for which she issued her own certificates without recourse upon herself, to be paid by West Virginia, the old bonds having been surrendered and canceled.

The record discloses that she has no interest in these certificates, as they impose no obligation upon her, and leave the creditors without any right of action or demand against her upon the failure or refusal of West Virginia to assume their payment. It also appears from the record of the bill and its exhibits that upon the failure of the commission into whose hands these certificates were placed to collect these certificates, that they are to be surrendered to the committee representing the owners thereof, and in the event that suit should be brought by Virginia against West Virginia, that the owners are to defray all expenses including the fees of counsel, and that no decree can be entered in this cause that will inure to the benefit of the plaintiff.

No one can examine the bill and its exhibits in this suit without being satisfied beyond all doubt that it is in legal effect commenced and now prosecuted, so far as said certificates representing the old debt are concerned, solely by the owners thereof and for their benefit and not for the State of Virginia. No decree as to these certificates can inure to the benefit of Virginia. Her only relation to them is her assurance to their holders that she will aid them by bringing suit in reference thereto at the expense of the owners. She is the merest nominal plaintiff carrying on the suit in her own name with an immunity from all costs of any character whatsoever.

This suit is governed, so far as the demand respecting the old debt of Virginia is concerned, by the well settled principles already laid down by this Honorable Court in the following cases:

New Hampshire *v.* Louisiana, and New York *v.* Louisiana, 108 U. S. 76, 27 Law. ed. 656.

See also in this connection *Re Hartung*, 98 Wis. 140, 73 N. W. 988; *People v. General Electric Ry. Co.*, 172 Ill. 129, 50 N. E. 158.

To create a controversy between two states, it seems to us that there must be an assertion of a substantial right of one state as such which is denied or repudiated by the other, and which relates to the interests of each as states, and that the determination of the issue thus raised will promote or secure some substantial right of the one or the other of these states as states.

This may be illustrated by some of the decided cases, in each of which it was held that the contention involved a controversy between states.

New Jersey v. New York, 5 Pet. 285, 8 L. ed. 127; *Rhode Island v. Massachusetts*, 12 Pet. 657, 9 L. ed. 1233; *Florida v. Georgia*, 11 Howard 293, 13 L. ed. 702; *Virginia v. West Virginia*, 11 Wall. 39, 20 L. ed. 67 were cases in equity and all involved state boundaries; *Pennsylvania v. Wheeling Bridge Company*, 9 How., 657; 13 L. ed. 294; *S. C. 11 How. 528*, 13 L. ed. 799; *S. C. 13 How. 518*, 14 L. ed. 249; *S. C. 18 How. 429*, 15 L. ed. 436, was a case in equity involving the free and unobstructed navigation of the Ohio river which caused a special damage to the plaintiff state for which there was no adequate remedy at law.

These cases just cited present an exercise of jurisdiction in cases directly affecting the property rights and interests of a state and that over lands and their inhabitants claimed by the states themselves.

Missouri v. Illinois, 180 U. S. 206, 45 L. ed. 497, involved a case in which the health and comfort of the inhabitants of a state were threatened.

South Dakota v. North Carolina, 192 U. S. 289, 48 L. ed. 488, was a suit in which the plaintiff sought the enforcement of the payment of a debt belonging exclusively to the plaintiff and no one else had any interest therein, and the jurisdiction was sustained by a majority of the court.

In the suit now before the court what interest can Virginia claim against West Virginia in certificates that do not belong to her and in which she can assert no interest? She cannot maintain a suit to vindicate her integrity in the matter of the issuance of these certificates. This is entirely too flimsy to constitute the basis of a controversy, and besides this, the act or its motives has not been assailed or questioned by West Virginia.

The conclusion is irresistible that Virginia has no interest in this suit so far as it is designed to enforce payment of the debt represented by said certificates, that it is being prosecuted for their owners and that as to such matters there is no controversy between the two states, and that the bill as to this matter must be dismissed.

II.

THE COMPLAINANT HAS NOT SHOWN SUCH INTEREST
IN THE DEFERRED CERTIFICATES AS GIVES HER ANY
STANDING IN A COURT OF EQUITY.

Does the Commonwealth of Virginia have such an interest in the subject matter of litigation or in the result thereof, so far as the deferred certificates are concerned, as to give her any standing in a court of equity in relation thereto?

As we have already seen, the former owners of the old debt are the present owners of these certificates; that they were placed in the hands of a committee whose members these owners had chosen, and this committee delivered the certificates to a commission selected under a joint resolution of the General Assembly of Virginia, who were empowered to collect these certificates for the owners at the sole expense of such owners.

The right of Virginia to maintain a suit as sole plaintiff therein, must be determined by the well settled rules of equity practice as recognized and enforced by the English Court of Chancery, and as understood and applied by this Court.

Virginia has no interest in these certificates, nor can her interests be in any manner affected by a decree in relation to these certificates.

She is not a guarantor because their issuance is based upon the condition of her non-liability in any event, and as a consideration of her release from all liability upon these certificates, and the portion of the debts represented by them, she issued new bonds for her old debt, and was acquitted from all obligation as to these certificates. In what way can she be interested in this suit so far as it relates to these certificates? Does her interest at most exceed that of a mere committee representing the holders thereof? Has she any connection with them except by her agreement to aid their holders in an effort to enforce their collection? Has she not constituted herself a mere medium for the institution of this suit in her own name for the use and benefit of the holders and owners of these certificates?

If she has any connection with this part of the suit it is as its mere promoter, by virtue of her promise to the holders of the certificates—an agent for them—only an instrumentality for the institution of this suit.

This is not such interest as to support a suit in equity. The

plaintiff's interest must be as substantial and certain as that of the defendant.

A person having no interest, legal or equitable, in land, beyond a mere possession, cannot maintain a bill in respect thereto.

Smith v. Hollenbeck, 46 Ill. 252.

Smith v. Brittenham, 109 Ill. 540.

"A complainant in chancery must have an interest in the subject matter of the controversy. Unless a complainant has some interest in the property in controversy his bill cannot be maintained."

Smith v. Hollenbeck, *supra*.

In Smith v. Brittenham *supra*, the court in its opinion, discussing the insufficiency or want of interest in the plaintiff to maintain the suit, says:

"It is a well recognized rule that in equity the party having the beneficial interest in the subject matter of suit must sue in his own name for any invasion of his rights in respect thereto, although the legal title thereto may be in another. (Frye v. Bank of Illinois, 5 Gilm. 332; Elder v. Jones, 85 Ill. 384; Moore v. School Trustees, 19 *id.* 83.) It is also settled that no one, in the absence of statute authorizing it, can maintain a suit in chancery with respect to real estate to which he has neither the legal nor equitable title. (Bowles v. McAllen, 17 Ill. 30; Horace v. Harris, 11 *id.* 24.) If such an interest in the plaintiff is indispensable to the commencement of this suit, as will be conceded, the conclusion would seem to follow that where a party having such interest commences a suit, and before any hearing or disposition of the cause upon the merits, voluntarily transfers his interests to another, and the same is made to appear of record, as is the case here, the whole proceeding will become so defective for want of proper parties, that no valid decree can be entered in the cause until the complainant's assignee, by supplemental bill or otherwise, makes himself a party complainant to the suit—and this, indeed, is the well recognized doctrine and practice in such cases. Mason v. York & Cumberland R. R. Co., 52 Me. 82."

"Where the wrong complained of is one in which the State has no direct interest, any more than it has in an ordinary controversy between individuals, the State is not a proper party plaintiff, and the suit should be instituted by the particular individual who will be injured."

10 Enc. Pl. & Pr. 903, 904, and the very numerous cases cited in note 1.

"The rule is fundamental that no person can maintain a

suit respecting a subject matter with reference to which he has no interest, right or duty, either personal or fiduciary."

Hogg's Equity Procedure, sec. 37, p. 40, citing *Baxter v. Baxter*, 43 N. J. Eq. 82, 10 Atl. Rep. 814; *Ashby v. Ashby*, 39 La. Ann 105, 1 So. Rep. 282.

In *Ashby v. Ashby*, *supra*, the syllabus of the case is as follows:

"An action can only be brought by one having a real and actual interest which he pursues. So, where one claiming to be a judgment creditor of another seeks to annul a mortgage executed by the latter in favor of his children on the ground of fraud, and the record shows that the judgment on which the suit is founded is not in favor of the plaintiff, but in favor of her minor children for whom she was tutrix, and who had attained their majority before the action of nullity was brought, and they did not join in the action, the suit must be dismissed."

"Where a bill is filed for relief, it must be prosecuted in the name of the real party in interest."

Oakley v. Bend, 13th Edw. Ch. (N. Y.) 482.

The doctrine here cited is supported by numerous authorities, among which are the following:

Field v. Maghee, 5 Paige (N. Y.) 539; *Rogers v. Traders' Ins. Co.*, 6 *id.* 583; *Sedgwick v. Cleveland*, 7 *id.* 267.

It cannot be contended that because the State of Virginia has constituted herself an agent or representative of the holders of the certificates mentioned in the plaintiff's bill that this gives her any right to maintain the suit in her own name.

From the opinion delivered in *Oakley v. Bend*, *supra*, we take the following:

"A person who is a mere agent to sue for and collect money under a power of attorney, can not be a party to a bill for an accounting in his own name, nor be joined as a co-plaintiff with his principal. *King of Spain v. Machado*, 4 Russ. 225, 240, recognized in *Clarkson v. Depyester*, 3 Paige, 337, as good ground of demurrer. As a general rule, if an agent institutes a suit under an authority from his principal, he must do so in the name of his principal. *Lee v. Thomas*, 2 Ves. 313. And see *Calvert, Parties*, 229, 232, for the authorities on the subject."

The doctrine set forth in these authorities and cases is so firmly settled that further discussion or citation would seem superfluous.

and an annoyance to, and tax upon the time and patience of the court required for their notice or examination.

III.

THE REAL OWNERS OF THE DEFERRED CERTIFICATES HAVE SUCH A SUBSTANTIAL INTEREST AND RIGHT OF OWNERSHIP THEREIN AS TO MAKE THEM INDISPENSABLE PARTIES, WHOSE PRESENCE WOULD OUST THE COURT OF ITS JURISDICTION.

The practice in this court in cases in equity is regulated by the former practice of the courts of chancery in England. And in cases of original jurisdiction it will frame its proceedings according to those which had been adopted in the English courts in analogous cases, and follows the general rules of that court in conducting a cause to a finality.

California v. Southern Pacific Railroad, 157 U. S. 229, 249, 39 L. ed. 683, 690.

The only instance wherein the court will deviate from or refuse to follow this practice is when it impairs the case by unnecessary technicalities, or defeats the purpose of justice.

California v. Southern Pacific Ry. Co., *supra*; citing *Florida v. Georgia*, 58 U. S., 17 How., 478, 15 L. ed. 181.

The general rule as to parties in equity as followed in English chancery practice, was well settled at the time the jurisdiction of the Supreme Court of the United States was created, and is thus laid down by Mr. Daniell:

"It is the constant aim of a court of equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, so as to make the performance of the order of the court perfectly safe to those who are compelled to obey it, and to prevent further litigation. For this purpose all persons materially interested in the subject ought, generally, either as plaintiffs or defendants, to be made parties to the suit, or should have served upon them a copy of the bill, or notice of the decree, to have an opportunity afforded of making themselves active parties to the cause if they should think fit."

I Daniell's Ch. Pl. & Pr. (4th Am. Ed.) 190.

This rule under some circumstances, not important to be considered here, may be dispensed with when its application becomes extremely difficult or inconvenient.

Equity Rule 48.

This court, in *Caldwell v. Taggart*, 4 Pet. 190, 7 L. ed. 828, says:

“The general rule is that however numerous the persons interested in the subject of the suit, they must all be made parties plaintiff or defendant, in order that a complete decree may be made; it being the constant aim of a court of equity to do complete justice by embracing the whole subject, deciding upon and settling the rights of all persons interested in the subject of the suit; to make performance of the order perfectly safe to those who have to obey it, and to prevent future litigation.”

In *Barney v. Baltimore*, 73 U. S., 6 Wall., 280, 18 L. ed. 825, speaking with reference to the subject of parties, the court decides as follows:

“Courts of chancery will refuse to make a decree where, by reason of the absence of persons interested in the matter, the decree would be ineffectual, or would injuriously affect the interests of the absent parties.”

In *Shields v. Barrow*, 58 U. S., 17 How., 130, 15 L. ed., 159, the subject of parties to suits in equity received a very thorough consideration at the hands of the court, whose opinion was delivered by Mr. Justice Curtis, and in which he classifies parties to a bill in equity as follows: Formal parties; second, necessary parties; third, indispensable parties. Those under the second class include all persons having an interest in the controversy, and who ought to be made parties in order that the court may act upon that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice by adjusting all the rights involved in it. If the interests of this class of parties are separable from those of the parties before the court, so that the court can proceed to a decree and do complete and final justice without affecting other persons not before the court, then the latter are not indispensable parties.

Those coming under the third class are those persons who not only have an interest in the controversy, but an interest of such a nature that a final decree can not be made without either affect-

ing the interest, or leaving the controversy in such condition that its final determination may be wholly inconsistent with equity and good conscience.

This well considered opinion, which has been followed in many subsequent cases, contains several illustrative cases of the rule here announced as to the classification of parties to a bill in equity.

One of the points in the syllabus of the last case cited states the rule as follows.

“Persons having rights which must be affected by the decree cannot be dispensed with.”

In the case before the court the holders of the deferred certificates, who own both the legal and equitable title thereto are not made parties. The only plaintiff seeking relief is the State of Virginia, who has brought the suit in her own name without any title to this part of the subject matter of the suit, and without any direct or substantial interest in the result thereof. The purpose of this suit is to settle the liability of West Virginia on these deferred certificates to the owners and holders thereof, and any decree which is rendered in this case must relate solely to their rights. The court can not enter any decree with reference to these certificates which must not necessarily affect the interests of these outstanding owners and holders, who are not before the Court either as plaintiffs or defendants.

The purpose of the bill is not only to fix a liability on the State of West Virginia for the payment of these certificates, but also for an accounting to determine the extent of this liability. So it is clearly and at once perceivable that the holders of these certificates are vitally interested as to both of these purposes of the suit.

Therefore, as these persons have no opportunity to be heard, and as the decree can not bind them, the court cannot, for that very reason, afford any relief to the nominal plaintiff, the Commonwealth are vitally interested as to both of these purposes of the suit.

Suppose it be contended that these bonds are now held by the Commission created by the State of Virginia, apparently possessing powers to act as a corporate body, to negotiate with reference to these certificates, and that this commission holds the bonds in trust, as it evidently does, for the bond holders. Would not the Commission at least, acting in its fiduciary capacity, be an indispensable party to this suit? Could the State of Virginia, divested of all interest in these certificates, sue in her own name both for this com-

mission and the beneficiaries, who are the owners of these certificates? This Commission being a creature of the legislature of Virginia, endowed with corporate capacity to act in furtherance of the objects of its creation, is evidently interested in carrying into effect the steps which it has taken to secure the payment of these evidences of indebtedness.

But defect of parties may ordinarily be remedied by an amendment of the bill in such a manner as to cure this defect, and thus avoid the effect of a demurrer for want of parties. This is the general or ordinary rule—the one usually observed by the courts. Indeed, a court ought not to dismiss a bill and deny relief where the only obstacle to the granting of relief is the want of essential parties, when the bill may be relieved from this objection by amendment.

This case, however, constitutes an exception to this rule. It must be clearly apparent that the relationship of the owners or holders of the certificates, to the suit, if brought into the case, must be that of plaintiffs; and as they are numerous, a few could join, suing on behalf of themselves, and all others similarly situated, and thus avoid the inconvenience of large numbers appearing on the record as plaintiffs in the suit. They would be the real plaintiffs, with the State of Virginia as a mere nominal party, thus creating a suit by individuals against a state of the Union, which is prohibited by the Constitution.

If an amendment were thus permitted so as to bring the Commission as the Trustee into this case as a party plaintiff, or this Commission together with the owners as co-plaintiffs with the State of Virginia, there would be presented a case in which the real parties in interest as individuals are the plaintiffs, in which a state with no interest and as a mere nominal party would be joined, thus allowing an individual to do by indirection associated with the state as a nominal party what he would be prohibited from doing in his own name. An evasion of this sort will not be permitted by the court, and the bill in this regard is not amendable, and the court on this consideration alone has no jurisdiction of that part of the bill seeking to establish the liability of West Virginia on these deferred certificates, and the extent of such liability.

If, however, the State of Virginia should ask to amend her bill by making the Commission as Trustee and holder of these certificates a party defendant, in order to give these owners and holders representation in the suit, if this could be done in the absence of

the real parties in interest, then the court would have no jurisdiction under the principles laid down by this court in numerous cases which are cited and reviewed in the opinion announced in *California v. Southern Pacific Co.*, 157 U. S. 229, 39 L. ed. 683. So, we perceive that as to this feature of the bill now under consideration, the court has no jurisdiction in any aspect of the case, nor can any amendment be made so as to give this court jurisdiction.

IV.

THE FACT THAT THE COMMISSIONERS OF THE SINKING FUND AND LITERARY FUND OF VIRGINIA HAVE IN THEIR POSSESSION COMPARATIVELY SMALL PORTIONS OF THE SAID CERTIFICATES ISSUED BY THE PLAINTIFF DOES NOT GIVE THE PLAINTIFF ANY CAUSE OF ACTION AGAINST THE DEFENDANT.

The commissioners of these two funds are mere state agencies or instrumentalities created by the Commonwealth of Virginia, to care for and preserve certain of her own financial resources, available for specific purposes, and which belong exclusively to Virginia. A few of the old bonds of Virginia issued prior to 1861 were by her converted into immediately available money by being deposited with these commissioners, and were therefore never sold and the title transferred from her so as to create a liability against the State herself, and hence at no time was there ever any right of action or liability on account of these old bonds so deposited with the said commissioners which could properly be asserted against the old state. In other words, these few old bonds deposited with these commissioners did not create any debt against the State of Virginia. At no time or under any circumstances could these bonds have been made or become a legitimate subject matter of controversy or suit against the Commonwealth of Virginia. To make them such, would present the grotesque spectacle of a sovereign state suing herself, for an accounting and payment to herself of her own funds, already under her absolute control.

Again there can be no liability in favor of the State of Virginia against the State of West Virginia on these bonds so held. The moneys in the sinking fund which purchased these bonds previous to the first day of January, 1861, were raised by the revenues of the entire State before the division, and they were therefore the property of

such entire State, and being in the ownership of the State itself, the debtor, they were a dead asset both as to that portion of the State which passed into the new State and the State of Virginia as she remained, and Virginia claiming to be such owner has no more right to institute and prosecute a suit thereon against West Virginia than would West Virginia if a similar bond had fallen into her possession. If there is any liability in respect to said bonds it is a liability of the State of Virginia to the State of West Virginia for a portion thereof.

Then if this were the status of Virginia as to the old bonds held by the commissioners of her Sinking Fund and Literary Fund, prior to 1861, and which remained unchanged at the time of the formation of the State of West Virginia, could their refunding and the issuance of the deferred certificates as to the one-third of them alter this status with reference to her right of suit thereon, or any part of them? The very propounding of the question must evoke a negative answer.

The idea of debt necessarily implies an obligation payable by the debtor to some third party—a creditor existing independently of the debtor, and over whom, as to the obligation asserted, the debtor can have no control, and in the use or disposition of which the debtor has no right or interest whatever.

How then—upon what principle—upon what ground or reason—can Virginia claim that the old bonds placed by her with her Commissioners of the Sinking and Literary Funds, were or are now any part of her *ante bellum debt*? We are wholly unable to perceive any. In fact, there is none.

If it be contended that the commissioners of the Sinking and Literary Funds are distinct entities from the State, persons clothed with an existence distinct and separate from the Commonwealth, with the right to assert a liability against Virginia on account of these old bonds acquired by them prior to the erection of the territory contained within the boundaries of West Virginia into a state, then and in that event this court cannot entertain jurisdiction of the suit, because these commissioners are necessary parties thereto, and the commission having been created and existing under and by virtue of the laws of Virginia, must be a citizen of Virginia, and if a distinct entity, it must necessarily be a corporation having its domicile in Virginia, where it was created.

Thus, we perceive that in any aspect of the case, the court has no jurisdiction of this suit so far as the certificates belonging to these

commissioners are concerned. In fact, this feature itself of this cause constitutes no ground of controversy between the parties to the bill.

V.

THE CLAIM FOR PROPERTY TRANSFERRED BY THE PLAINTIFF TO THE DEFENDANT CONTAINED WITHIN THE BOUNDARIES OF THE TERRITORY OUT OF WHICH WEST VIRGINIA WAS ERECTED INTO AN INDEPENDENT STATE CREATES NO RIGHT OF ACTION ON THE PART OF VIRGINIA FOR THE VALUE OF THIS PROPERTY.

In February, 1863, the General Assembly of the State of Virginia passed the following Act, declaring:

“That all property, real, personal and mixed, owned by or appertaining to this state, and being within the boundaries of the proposed State of West Virginia, when the same becomes one of the United States, shall thereupon pass to, and become the property of the State of West Virginia, and without any other assignment, conveyance or transfer or delivery than is herein contained, and shall include among other things not herein specified all lands, buildings, roads and other internal improvements or parts thereof, situated within said boundaries, and vested in this state, or in the President and Directors of the Literary Fund, or the Board of Public Works thereof, or any person or persons for the use of this state, to the extent of the interest and estate of this State therein and shall also include the interest of this state, or of the president and directors, or of the said board of public works, in any parent bank or branch doing business within the said boundaries and all stocks of any other company or corporation, the principal office and place of business whereof is located within the said boundaries, standing in the name of this state, or of the said president or directors, or of the said board of public works, or of any other person or persons for the use of this state.

“That if the appropriations and transfers of property, stocks and credits provided for by this act, take effect, the State of West Virginia shall duly account for the same in the settlement hereafter to be made with this state provided that no such property, stocks and credits shall have been obtained since the organization of the state government.”

The bill of complaint relating to this property makes the following allegation:

“Your Oratrix is informed, believes, and so charges that the property which was by the operation of this act appropriated and transferred from the State of Virginia to the State of West Virginia, and which was subsequently received and enjoyed by the State of West Virginia, consisted of a number of items, and the value of it amounted, in the aggregate to several millions of dollars, the exact amount your oratrix is unable at this time more definitely to ascertain and state. That of the bank stocks alone, which were transferred under the operation of this act, the State of West Virginia realized and received into her treasury, from the sale thereof, about six hundred thousand dollars, and that no part of the property so received by West Virginia had been obtained by Virginia since April, 1861.”

It will be observed that all the property mentioned in this act was located within the territory comprised within the boundaries of West Virginia, and was designed for the use of the latter in the formation of a state government and in promoting the purposes of its establishment. The parent state parted with certain of her own territory and resources to create a new state within her own boundaries and to exercise over a part of her own people the powers of government, to be thereafter created by them, and to assume all the burdens and responsibilities incident to a state, and to erect for themselves all public institutions necessary to conduct the operations of the government of the new state, thus proposed to be created. Virginia in this act proposed new duties and obligations for a part of her own citizens, and at the same time declared in her own halls of legislation what should be done by the new state which then had no existence, but which she, by her own act and that of the general government, designed to bring into existence, by parting with the very property which she intended should be used by the new government and a part of the people of Virginia would share in the benefits and advantages thus afforded.

Now can Virginia by her own act create an obligation to be assumed by a state not then in existence and which she by her own acts aids in creating? Can she, in this act, declare that a creature not then in being, shall account to her for property which she herself really bestows upon a part of her own citizens, and who, in the true sense of the term, are the real owners thereof, and when she has thus freely bestowed her own bounty upon her own citizens,

make a demand thereafter upon the new government when it has been established, and that too when this new government is to extend to a large part of the citizens of Virginia full protection in the enjoyment of all their absolute and social rights? If so, upon what legal or moral principles can such a claim be predicated? The parent thus transfers all the burdens of her own government to a new state, created in her own boundaries, divesting herself of all responsibility for the conduct and safety of a large part of her former population and impose upon another sovereignty these very obligations which she herself had borne, and that, too, by her own act, and now seeks indemnity and compensation from this sovereignty for performing a duty which she herself has been relieved by her own act and concession.

By this act Virginia simply declared to a part of her own citizens that they could organize themselves into a government in a part of her own territory and thus become an independent state. These citizens of Virginia were the promoters and she co-operated with them to the end that a new state might be formed.

It will not be overlooked that the territory of Virginia was divided in 1863 while she retained her own identity and institutions, and out of the territory which she surrendered, and within it, a new state arose.

This is not the case wherein one state is treating with another, whereby one state cedes a part of her territory to be added to the domain of the latter. In such case she could stipulate the terms of the cession, which would constitute a compact between the two states enforceable as a binding obligation. Their attitude towards each other would be that of two independent and competent contracting parties.

Here the attitude of Virginia is very different. She, on the one side, proposes that a new state may be organized if the National Government will assent to its admission into the Union. She cannot propose conditions in advance of the creation of the new state, and enforce them against it as the price of property within its own territorial limits. This would constitute a mere *nudum pactum*. It would be without consideration because whatever is within the boundaries of a new state belongs to it, both upon reason and authority.

“The new State on its part carries with it only local obligations, and whether contracted for local objects or secured by a lien on local revenues, and such local duties as arise out of

agreements to maintain the channel of a river or to levy no more than certain tolls along its course. As a compensation for such burdens the new state is entitled to property within it of a local character, or to such, not within it, as belongs to state institutions localized there, and to the privileges arising from treaties specially contracted for the benefit of its territory, such for instance as contain demarcations of its boundaries, and such as secure to its inhabitants, or a part of them, the right to navigate streams running through other countries from its frontiers." Taylor, International Public Law, p. 204, citing Hall's Treaties on International Law (4th Ed., Oxford.) Sec. 27.

So if the new state is entitled to property within it of a local character, or to such not within it, as belongs to state institutions localized there, upon what principle can Virginia base a claim for the value of property within the territory of the new state of West Virginia? She cannot found it upon the doctrine of public international law. Neither can she found it upon an act of her own legislature, nor can she do so upon any act or agreement upon the part of West Virginia, for West Virginia did nothing, nor has she done anything to authorize it, as the new state was not a party to the agreement. Virginia has no claim and can have no claim for property, real or personal, localized or pertaining to or belonging to institutions localized in the territory out of which West Virginia was formed. She cannot base this claim upon treaty or compact, because at the time she declared by her own act of assembly that this property was to be taken by the new state when it came into being, there was no representative to act on behalf of the proposed new state so as to accept a cession of property upon terms proposed by the owner. This act of assembly could not be construed as a treaty between the state of Virginia and the proposed new state, as this was a mere *ex parte* act emanating from Virginia alone, and a treaty in its humblest and narrowest aspect, "is a mere agreement between states for the settlement of their current interests or controversies, made either with a tacit admission of the existence of the common law of nations, or with the express stipulation that some principle of that law shall be changed or modified in a particular case." Taylor, International Law, p. 93.

Hence the making of a treaty necessarily presupposes and assumes the presence and participation in its negotiations of two sovereign powers capable of acting. Another reason why it could not be referable to treaty is that one state cannot enter into a treaty

with another state without the consent of Congress. In February, 1863, when this act of assembly was passed, upon which Virginia rests her claim as presented by this feature of the bill, West Virginia had not been fully created and organized. Now, then, shall Virginia passing the title of property by her own act and imposing terms both unfair and unfounded upon the principles of public law, assert a claim to the value of this property when conditions have changed and the new sovereignty finds herself in possession of this property which is within her own territory, and actually necessary for the legitimate purposes of the new government? But it may be said or contended that if West Virginia is liable for her equitable portion of Virginia's public debt, is she not also liable for the public property of Virginia localized in the territory of the new state, or belonging to any of the public institutions localized there? This admits of plain and satisfactory answer in the negative.

West Virginia's attitude as to the public debt of Virginia was provided for by the ordinance of Virginia and the constitution of West Virginia, and in the absence of such provision, it can scarcely be contended that the State of Virginia could assert any liability against the State of West Virginia as to any part of said debt.

Furthermore, there is nothing in the record to show that Virginia, either by her Act of Assembly or by any act on the part of her governor, has authorized any demand upon the state of West Virginia for compensation for property situated in the territory now comprising the State of West Virginia.

The bill sets up a further claim for property predicated upon the Act of the General Assembly of Virginia passed on the 4th day of February, 1863, and which, according to the bill, is in the following language:

"1. That the sum of One Hundred and Fifty Thousand Dollars be and is hereby appropriated to the State of West Virginia out of moneys not otherwise appropriated, when the same shall have been formed, organized and admitted as one of the United States.

"2. That there shall be, and hereby is, appropriated to the said State of West Virginia when the same shall become one of the United States, all balances, not otherwise appropriated, that may remain in the treasury, and all moneys not otherwise appropriated that may come into the treasury, up to the time when the said State of West Virginia shall become one of the United States; provided, however, that when the said State of West Virginia shall become one of the United

States, it shall be the duty of the auditor of the State to make a statement of all the moneys that up to that time have been paid into the treasury from counties located outside of the boundaries of the said State of West Virginia, and also of all moneys that up to the same time, have been expended in such counties, and the unexpended surplus of all such moneys shall remain in the treasury and continue to be the property of this state."

After reciting this act the bill avers:

"And this last named sum of One Hundred and Fifty Thousand Dollars, together with other sums belonging to the State of Virginia, were turned over to and received or collected by the new State of West Virginia after its formation as aforesaid."

The same reasons and principles apply to this item demanded by Virginia from West Virginia, because of personal property located within the territory comprised within the State of West Virginia, that is applicable to the demand of a similar character made in the bill by reason of the Act already quoted passed by the General Assembly of Virginia on February 3, 1863.

It does seem to us that this claim of Virginia, which she rests upon the two acts passed by the General Assembly of February third and fourth respectively, in the year 1863, is not only without foundation upon any principles of law or equity, but is most unjust and unreasonable.

It is quite apparent that Virginia demands that West Virginia shall pay one-third of the old debt of Virginia upon the sole ground that she parted with one-third of her territory, and therefore, on that ground alone, West Virginia should be made to bear that portion of her *ante bellum* debt to the holders thereof, while Virginia should meet and discharge the other two-thirds of this obligation.

Has it occurred to the authorities of Virginia that when she parted voluntarily with one-third of her territory, she at the same time retained all of her institutions, or nearly so, intact, with the means in her own control of continuing the operations of her state government, while the territory she parted with had to be erected into a state government, all the institutions necessary to its operation to be constructed, and great expense incurred in order to bring the territory into the status of an independent state and put her machinery of government into operation? In this aspect of the case, Virginia cuts off about one-third of her domain, containing a large

percentage of her citizenship, sets them adrift without the means of government, and now demands not only that the new government erected out of this territory shall bear the burden of one-third of her public debt, but also pay to her compensation for "all lands, buildings, roads, and other internal improvements, or part thereof, situated within said boundaries, and vested in this State (Virginia), or in the president and directors of the literary fund, or the board of public works thereof, or in any person or persons for the use of this State (Virginia), to the extent of the interest and estate of this State (Virginia) therein," and all other property within the boundaries forming said new state, as well as all money properly belonging to the institutions of the state of Virginia localized in these boundaries.

On the other hand Virginia refuses to recognize any liability for the one-third of this debt on the very arbitrary basis assumed by her for its adjustment, still retains intact all property and institutions of every kind and character within her own domains, demanding compensation also for every article of property of any value with which she parted, and that too by her own act of legislation. She cannot in equity and good conscience make this two-fold demand. She must forego her claim upon West Virginia for the liquidation of any part of her public debt, or she must concede to West Virginia the absolute ownership in all the property localized within her boundaries. But she cannot now deal with the one-third of her old debt, because she is practically released from any liability thereon by reason of the acts and course pursued by her with the creditors themselves. The only parties that are now asserting any demand against West Virginia as to the one-third of the old debt of Virginia are the creditors themselves—the true and legal owners and holders thereof. The right to look to West Virginia for the payment of this one-third, if the right exists anywhere, necessarily resides in the creditors, and not in the State of Virginia. She, therefore, has left the demand as to one-third of the debt against West Virginia, so far as she herself is concerned, in the hands of the creditors, and no act of hers can now affect their substantial rights. She cannot, therefore, do anything at this time to release West Virginia from any part of the demand which the creditors are asserting against her through the medium of this suit nominally instituted by Virginia.

She is therefore referred to the only alternative in *pro conscientiae aut legis*, and that is, a relinquishment of her own demand for

compensation for property left by her within the boundaries of the territory out of which the state of West Virginia was created. She can only, therefore, stand upon that feature of her bill which relates to her old public debt, and as to this feature of the case, as we have already shown, she is without standing in a court of equity.

VI.

THE PLAINTIFF CANNOT ASSERT THE CLAIM WHICH SHE SETS FORTH IN HER BILL IN A COURT OF EQUITY.

In considering the proposition that the plaintiff cannot assert the demand contained in the bill in a court of equity, we must keep in mind the relation which Virginia bears to that portion of her *ante bellum* public debt which is sought to be made the subject of controversy in this suit. She disclaims at this time all liability to her creditors on account of the so-called equitable proportion thereof which she insists shall be borne by the state of West Virginia, at the same time averring that she has adjusted and settled two-thirds of the original debt by agreement and contract between herself and its owners.

It is patent upon the face of the bill and its exhibits, as hereinbefore stated, that the prosecution of this suit by Virginia is solely in the interests of the owners and holders of the deferred certificates issued by Virginia herself without recourse upon her, and set apart as a liability of West Virginia to the holders of the old obligations, which have been surrendered to the state of Virginia and by her cancelled in accordance with her own acts of legislation.

She therefore cannot come into a court of equity to assert a right of contribution against West Virginia. There are two clear and cogent reasons for this:

(a) First, the decree which she seeks to obtain cannot inure to her benefit, but only to that of the holders of the deferred certificates.

(b) Second, she must have paid everything for which she and the new state were jointly liable so as to relieve the new state from all liability before she can seek contribution from her joint obligor.

That this is the principle upon which rests the equitable right of contribution is the recognized and well settled doctrine of the courts.

Springer v. Foster, 21 Ind. App. 15, 60 N. E. 720.

Kirkpatrick v. Murphy, 3 N. J. Law 506.

Grove v. O'Brien, 1 Md. 438.

Rooker v. Benson, 83 Ind. 250, 256.

Zook v. Clemmer, 44 Ind. 15.

Pegram v. Riley, 88 Ala. 399, 6 South. 753.

Screven v. Joiner, 1 Hill Ch. 252, 26 Am. Dec. 199.

The rule is universal that the party seeking contribution must have paid more than his share in order to maintain a suit for contribution.

9 Cyc. 699; 3 Am. & Eng. Dec. in Eq. 163.

The demand made by Virginia which she claims arises out of the acts of her General Assembly, passed February 3rd and 4th, respectively, in the year 1863, whereby she transferred certain real and personal property belonging to her to be used by the new state when created and organized, if it has any validity, which is not conceded here, is purely a legal demand and one which cannot be asserted under any circumstances in a court of equity.

If it be an equitable demand, upon what principle or doctrine of equity does it rest? It is not secured by any lien; it is not in the nature of a trust; it rests upon no equities to be asserted in order to enter a decree or to make the claim available. It is simply a money demand for the value of property which the plaintiff claims was used and appropriated by the defendant for which payment should be made.

This court has declared in *Scott v. Neely*, 140 U. S. 106, 117, 35 L. ed. 358, that,

"All actions which seek to recover specific property, real or personal, with or without damages for its detention, or a money judgment for breach of a simple contract, or as damages for injury to person or property, are legal actions and can be brought in the federal courts only on their law side."

This principle is based upon the seventh amendment to the Constitution of the United States, which declares that,

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

In the federal courts this right cannot be dispensed with except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency. Such aid in the federal courts must be sought in separate proceedings, to the end that the right to a trial by jury in a legal action may be preserved intact.

Scott *v. Neely*, *supra*, in the opinion of the court.

Pursuing this provision of the organic law of the United States, the sixteenth section of the judiciary act of 1789, enacted that such suits "shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law;" and this prohibition is carried into the revised statutes of the United States.

Section 723.

This provision of the revised statutes "is simply declaratory of the rule obtaining and controlling in equity proceedings from the earliest period in England, and always in this country. And so it has been often adjudged that whenever, respecting any rights violated, a court of law is competent to render a judgment affording a plain, adequate and complete remedy, the party aggrieved must seek his remedy in such court, not only because the defendant has a constitutional right to a trial by jury, but because of the prohibition of the Act of Congress to pursue his remedy in such cases in a court of equity."

Scott *v. Neely*, *supra*, citing *Hipp v. Babin*, 60 U. S. 19 How., 271, 278, 15 L. ed. 633, 635; *Lewis v. Cox*, 90 U. S. 466, 470, 23 L. ed. 70, 71; *Killian v. Ebinghaus*, 110 U. S. 568, 573, 28 L. ed. 246, 248; *Buzard v. Houston*, 119 U. S. 347, 351, 30 L. ed. 451, 453.

As already stated, the demand asserted by Virginia for money and property localized within the boundaries of West Virginia is simply for a debt predicated upon the transfer of property by Virginia and appropriated by West Virginia after her creation and organization as a state.

The demand made by the bill in this respect is for the money mentioned in the Act of February 4th, 1863, and the value of the property designated in the Act of February 3rd of the same year.

On the common law side of the court this demand may be made the subject of an action of debt, or even of an action of assumpsit

on the implied promise, if any legal liability exists, which is not here conceded, on the part of West Virginia to repay Virginia the money which she used and to compensate her for the property appropriated and used, the amount of which would depend upon its value.

Therefore, the demand in the case now before the court is the alleged debt due the complainant for this property which in no respect differs from any debt upon contract; it is the subject of legal action only in which the defendant is entitled to a jury trial in this court.

But it may be contended that there is no precedent for the trial of an action at law in this court, in which a jury may be empaneled as in ordinary trials in actions at law instituted in the Federal Circuit Court. It may also be contended that this is an exceptional case to be tried in a court exercising exceptional original jurisdiction, and that therefore the ordinary distinction between law and equity ought not to be observed and followed. If there were no precedent for this, there is no assignable reason why such a precedent should not now be made.

But this court has already declared that it will not entertain a suit in equity brought by a state where an adequate remedy at law exists.

In *Georgia v. Brailsford*, the fourth case entered upon "the original docket" of the Supreme Court, a definition was first given of the original jurisdiction of this court. During the pendency in the circuit court of the district for Georgia between Brailsford and others and Spradling, to which the State of Georgia was not allowed to be made a party, this state, in February, 1792, filed its bill in equity in this court seeking the aid of its original jurisdiction for an injunction, in behalf of the state, to stay the payment to others of a certain debt in controversy in the said circuit court, which the State of Georgia claimed had been vested in her by the Act of Confiscation passed May 4, 1782.

The judges of the Supreme Court were divided in their opinion on the question of granting an injunction upon the ground that Georgia had a complete and adequate remedy at law.

Therefore, in 1793, a motion was made to dissolve the injunction and dismiss the bill, and upon this motion the following order was indicated by the chief justice: "The bill, however, was founded in the highest equity; and the ground of equity for granting the injunction continues the same, that the money ought to be kept for

the party to whom it belongs. We shall therefore continue the injunction until the next term, when, however, if Georgia has not instituted her action at common law it will be dissolved."

Acting upon this statement of the court Georgia brought an action on the common law side of the original jurisdiction, perfecting her pleadings therein during February, 1794, a jury was empaneled for the trial of the case, and the court charged the jury in effect that the act of the state of Georgia did not vest the title to the debt in the state at the time of its passage, and that by the terms of the act the debt was not confiscated but only sequestered, and the right of the obligees to recover it revived on the treaty of peace.

The record then recites that "the jury retired for a few minutes, and, on their return to the bar, by their foreman, Reynold Keen, say they find a verdict for the defendant."

Taylor, Jurisdiction and Procedure of the United State Supreme Court, pp. 52, 53.

Mr. Taylor, in his very estimable work just cited, considering the matter now under discussion, says:

"No more emphatic assertion could have been made of the immemorial distinction between law and equity, or of the fact that the equity side of the original jurisdiction cannot be invoked when there is a plain and adequate remedy at law."
Idem, 53.

This same distinguished author, quoting from Carson's History of the Supreme Court, page 169, note 7, further says:

"It has been asserted that this is the only instance of trial by jury in the Supreme Court. This is an error. The minutes of the court disclose that in the case of *Oswald v. New York*, a jury was sworn and witnesses called, and a verdict found for the plaintiff of \$5,315.06. This was in February, 1795. Two years and a half later a writ of enquiry of damages in the case of *Catlin v. South Carolina* was executed at the bar of the Supreme Court, and a verdict was given for plaintiff for \$55,002.84. Although judgments were entered there is no record of any steps to enforce them."

At the time of the formation of the Constitution of the United States the distinctions existing between law and equity were well defined, and these distinctions were familiar to the framers of this instrument, and they considered it a wise policy to carry them into

the federal tribunals, and they have ever since been observed and enforced.

Therefore, Virginia's claim for a judgment against West Virginia for money and property located within the boundaries of the latter must be asserted at law.

It may be contended, however, that equity does have jurisdiction of that part of the bill which relates to the public debt of Virginia created prior to the formation of West Virginia, and that the court having jurisdiction of this feature of the case on equitable ground, which however is not conceded by West Virginia for the reasons hereinbefore stated, and though the other part of the demand may be legal in its nature, the court will entertain jurisdiction of the entire bill and grant full relief if the bill can be sustained upon any equitable ground whatsoever.

Be this as it may in some of the state courts, no such rule is observed in the federal courts.

It has long been a settled doctrine of the federal courts that legal and equitable claims cannot be blended together in the same suit.

In *Scott v. Armstrong*, 146 U. S. 499, 36 L. ed. 1059, the court, speaking through Mr. Chief Justice Fuller, in the course of its opinion says:

"Section 914 of the Revised Statutes, in providing that the practice, pleadings and forms, and modes of proceeding in civil causes in the circuit and district courts shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record in the state within which such circuit or district courts are held, in terms excludes equity causes therefrom, and the jurisprudence of the United States has always recognized the distinction between law and equity as, under the Constitution, matter of substance, as well as of form and procedure, and, accordingly, legal and equitable claims cannot be blended together in one suit in the circuit courts of the United States, nor are equitable defenses permitted."

In support of this doctrine thus so clearly announced, the learned Chief Justice cites a number of decisions of this court, together with some of the decisions of the circuit courts.

The same principle is announced in *Scott v. Neely*, 140 U. S. 106, 35 L. ed. 358, and from this case we here quote points five and six of the syllabus as follows:

"5. Remedies in federal courts at law or in equity, are not

according to the practice of State courts, but according to the principles of the common law and equity.

“6. A federal court has no jurisdiction of a suit in equity in which a claim, only cognizable at law, is united with a claim for equitable relief.”

These principles have been fully adhered to in all of the federal courts, and are always applied in strict conformity to the well marked distinctions here laid down.

Now what is the status of the case at bar from any standpoint of its consideration? If it be conceded that the bill states a claim in equity relating to the *ante bellum* debt of Virginia, it cannot admit of argument that the claim for compensation for property used by West Virginia within the territory constituting her own boundaries formerly belonged to Virginia, is a pure legal demand, which has been united in the bill, and therefore the court will not entertain jurisdiction in this suit.

But we earnestly insist, upon reason and authority, that the plaintiff has no standing, even in a court of equity, with reference to that part of the bill relating to her public debt created prior to the formation of West Virginia; that as to this feature of the cause there is no ground for the assertion of any claim by the plaintiff against the defendant either at law or in equity; that this part of the bill is without merit, and that upon no consideration can this part of the plaintiff's claim be entertained by this court. This then leaves the naked legal claim of the plaintiff undisposed of, and the court being without jurisdiction in equity will not hear the cause as to this feature of the bill. The entire bill is without equity, and the demurrer interposed by the defendant ought to be sustained.

VII.

THIS COURT HAS NO JURISDICTION TO SETTLE OR DETERMINE THE PRINCIPLE UPON WHICH WEST VIRGINIA SHALL BE MADE LIABLE FOR ANY PORTION OF THE OLD DEBT OF VIRGINIA, BECAUSE THIS WAS MATTER OF CONTRACT BETWEEN VIRGINIA AND WEST VIRGINIA UPON THE ADMISSION OF THE LATTER INTO THE UNION.

The constitution of the new state, as prepared and formulated, looking to its admission into the union, contained the following provision as to the old debt of Virginia:

"An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this State, and the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

On May 13th, 1862, the Legislature of Virginia passed an act entitled "An Act giving the consent of the Legislature of Virginia to the formation and erection of a new state within the jurisdiction of this state."

The first clause of said act is as follows:

*"Be it enacted by the General Assembly, That the consent of the Legislature of Virginia be and the same is hereby given to the formation and erection of the State of West Virginia to include the counties of Hancock, Brooke, * * * according to the boundaries and under the provisions set forth in the Constitution for the said State of West Virginia, and the schedule thereto annexed proposed by the convention which assembled at Wheeling on the twenty-sixth day of November, 1861."*

The third clause of said Act is as follows:

"Be it further enacted that this Act shall be transmitted by the executive to the senators and representatives of this Commonwealth in Congress, together with a certified original of the said Constitution and schedule, and the said senators and representatives are hereby requested to use their endeavors to obtain the consent of Congress to the admission of the State of West Virginia into the Union."

It was thus provided by said Constitution that the Legislature should ascertain the same as soon as it was practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years; that is, it provided for the ascertainment of such equitable proportion by the Legislature of the State of West Virginia independently of the State of Virginia, and further made provision as to how the State of West Virginia should pay the same, and having provided that the Legislature of West Virginia itself should ascertain such equitable proportion, and Virginia having consented that it should ascertain such portion, it is respectfully submitted that

neither Virginia nor any court can intervene and perform this legislative duty.

When West Virginia framed her constitution and inserted in it the provision concerning the public debt of Virginia created prior to 1861, and the State of Virginia through her Legislature accepted the Constitution of West Virginia as the basis of her consent, this created a compact between the two States and was absolutely binding both upon Virginia and West Virginia.

It is matter of history that the vote on the adoption of the Constitution of the new State was held on the first Thursday in April, 1862; that this vote was taken and the Constitution ratified by the people; that the act of the Virginia Legislature was passed on the 13th of May, 1862, shortly after the vote on the adoption of the said Constitution was taken. This act was directed to be sent to the senators and representatives of Virginia in Congress, with instructions to obtain the consent of congress to the admission of the State of West Virginia into the Union. Accordingly on the 31st day of December, 1862, Congress acted on the matter, reciting the proceeding of the convention of West Virginia, and that of Virginia, and the act of the Legislature of the State of Virginia requesting that the new State should be admitted into the Union, and it then passed the act for the admission of said State.

These matters are fully recited in the opinion of this court delivered in the case of the Commonwealth of Virginia against the State of West Virginia, decided in 1870, and reported in 11 Wall. 39-65.

The action of the proposed new state in adopting her constitution by popular vote, the consent of Virginia through her Legislature given to the formation of the new State composed of the counties recited in the act giving her consent, and the deliberate consent of Congress, as required by the Constitution, consenting to the formation of the new State and admitting her into the Union, constitute a compact between Virginia and West Virginia, the terms of which, with reference to the said debt, form a part of this compact and are inviolable under the Constitution of the United States.

Biddle v. Green, 5 Wheat. ¶ 5 Law. Ed. 547.

By this compact between Virginia and West Virginia, the former State referred to the Legislature of the latter the matter of ascertaining "an equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861," and therefore this "proportion" cannot be otherwise ascertained or de-

terminated than by the consent of the State of West Virginia; nor can its liquidation be otherwise provided for than by a sinking fund sufficient in amount to pay the accruing interest and redeem the principal of whatever sum may thus be ascertained as the equitable proportion that West Virginia agreed to assume. Virginia referred this matter absolutely to the judgment of the Legislature of West Virginia and tacitly agreed to abide by the action of this legislative body.

This stipulation or compact between Virginia and West Virginia, with reference to the public debt of the former, is a valid and binding contract, and Virginia can do nothing, either by legislation or otherwise, to impair this obligation. West Virginia has the undoubted moral and legal right to stand upon its terms; and if in the exercise of its judgment exercised upon a basis just and equitable, it should be ascertained by the Legislature of West Virginia that the State owes nothing to the bondholders of the old debt of Virginia, then there is no obligation whatever subsisting which can be enforced by the holders of any part of the old debt of Virginia, and especially has Virginia herself no cause of action against this State.

VIII.

THE EFFECT OF THE COMPACT BETWEEN VIRGINIA AND WEST VIRGINIA ARISING FROM THE ADMISSION OF THE LATTER INTO THE UNION AS A STATE UPON THE CLAIM OF VIRGINIA TO PROPERTY LOCALIZED OR PERTAINING TO INSTITUTIONS LOCALIZED WITHIN THE BOUNDARIES OF WEST VIRGINIA.

We have already presented to the court our considerations relating to this feature of the case upon grounds independently of that which is here presented, and have shown that Virginia cannot sustain this part of her claim in this suit. It seems to us, however, that there is a further and conclusive reason why this part of her demand is without foundation.

In the initiatory convention held by Virginia on the 20th of August, 1861, having as one of its objects the consideration of the matter of the formation of a new State out of a part of the territory within her then existing boundaries, the representatives in that convention did not consider any condition touching the formation of a new State other than the one that the new state should

take upon itself the payment of "a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861," and this was made the ultimate condition as expressed in the Constitution of West Virginia ratified by popular vote in April, 1862. This condition was, with some modification in the language employed to express it, inserted in the Constitution which West Virginia adopted. And Virginia, in May, 1862, signified her consent through her Legislature that the new state should be formed with the constitution which she had theretofore in April, 1862, adopted as her organic law, and with no other or additional burdens or liabilities touching the new state soon to be brought into existence, and needed only therefor the consent of Congress which was given in December, 1862.

When Virginia had given her consent properly expressed, as was done in this case, she could not revoke it, and the only other body whose action was essential to the creation of a new state that could impose other or further conditions touching her admission into the Union, was the Congress of the United States. Congress did give her consent in December, 1862, and it only remained for West Virginia to provide against slavery within her boundaries, and when this measure was adopted in the manner provided by the act of admission, West Virginia then became an independent and sovereign State of the Union.

After Virginia gave her consent to the formation of West Virginia in May, 1862, and the act of Congress was passed in December of the same year, providing for her admission as a state, all property localized in West Virginia, or belonging or appertaining to institutions localized there, passed to and became absolutely the property of West Virginia.

Therefore the acts of the Legislature of Virginia subsequently passed on the 3rd and 4th days of February, 1863, respectively, seeking to create a liability against West Virginia by an *ex parte* act, are without any force or effect to create any debt against West Virginia because of the matters in any of them to which the acts respectively relate. All of the property formerly belonging to Virginia located within the boundaries of West Virginia became and constituted a part of her public domain, and over which her territorial sovereignty extended as fully and efficiently as if no part of this property had ever belonged to the old state.

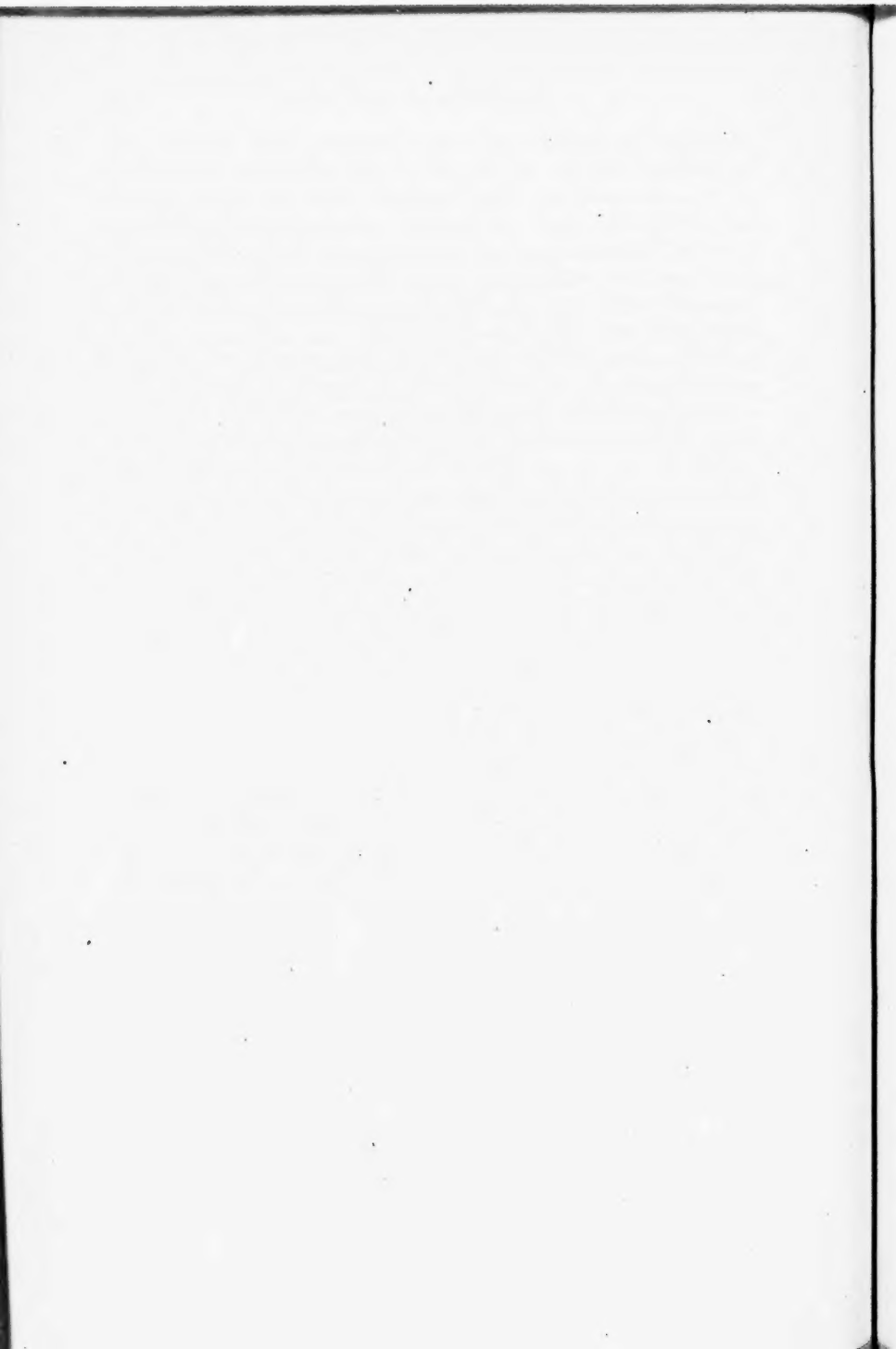
This necessarily results from the relation of the states to each other and to the general government. If it were otherwise and the

property and sovereign interests belonging to West Virginia, after her admission as a state into the Union, could be made the subject of disposal through a legislative act of Virginia efficient for the purpose for which such act was passed, then it would be within the sole power of Virginia to annihilate, by her own acts, all the instrumentalities and means necessary to uphold the integrity of West Virginia as a state. It would defeat her own avowed purpose as well as that of the national government.

Furthermore, if force and effect be given to these acts of legislation passed by the General Assembly of Virginia in February, 1863, it would necessarily impair the obligation of a contract existing between Virginia and West Virginia growing out of the terms of admission of the latter as a State into the Union. Because the only liability which she in any wise agreed to assume, and thereby did assume, was an "equitable proportion" of the public debt of Virginia.

It is now respectfully submitted that the State of Virginia has no claim against West Virginia with reference to her public debt, nor any valid demand against her for property localized within the boundaries of West Virginia; that it clearly appears upon the face of the bill that it is without equities to support it; and therefore the demurrer filed by the State of West Virginia ought to be sustained, and the plaintiff's bill dismissed.

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Supreme Court of the United States.

OCTOBER TERM, 1906.

Brief for Defendant on Demurrer.



IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

ORIGINAL, NO. 7.

COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

BRIEF ON DEMURRER.

The bill in this case sets up at least two separate and distinct causes of action, one in behalf of Virginia in her own right to have an accounting with the State of West Virginia for the value of certain property and money alleged to have been transferred to and received by the defendant State under two acts passed by the legislature of Virginia on the 3d of February, 1863, and the 4th of February, 1863; and the other in the name of Virginia as trustee, suing for the use and benefit of the owners of certain certificates set out and described in the bill and exhibits.

The first act under which it is alleged property was transferred provided as follows:

“That all property, real, personal and mixed, owned by, or appertaining to this State, and being within the boundaries of the proposed State of West Virginia, when the same becomes one of the United States, shall thereupon pass to, and become the property of the State of West Virginia, and without any other assignment, conveyance or transfer or delivery than is herein contained, and shall include among other things not herein specified all lands, buildings, roads,

and other internal improvements or parts thereof situated within said boundaries, and vested in this State, or in the president and directors of the Literary Fund, or the board of public works thereof, or in any person or persons for the use of this State, to the extent of the interest and estate of this State therein; and shall also include the interest of this State, or of the said president and directors, or of the said board of public works, in any parent bank or branch doing business within said boundaries and all stocks of any other company or corporation, the principal office or place of business whereof is located within said boundaries, standing in the name of this State, or of the said president or directors, or of the said board of public works, or of any person or persons, for the use of this State."

And by the fifth section it was enacted:

"That if the appropriations and transfers of property, stocks, and credits provided for by this act, take effect, the State of West Virginia shall duly account for the same in the settlement hereafter to be made with this State, provided that no such property, stocks and credits shall have been obtained since the reorganization of the State government."

It is then charged in the bill that the property which was transferred to the State of West Virginia under this act was received and enjoyed by that State, and consisted of a number of items the value of which amounted in the aggregate to "several millions of dollars," the bank stocks alone having realized to the State about "six hundred thousand dollars."

(R., pp. 4, 5.)

The second act is as follows:

"1. That the sum of one hundred and fifty thousand dollars be, and is hereby appropriated to the State of West Virginia out of moneys not otherwise appropriated, when the same shall have been formed, organized and admitted as one of the States of the United States.

- "2. That there shall be, and hereby is appropriated to the said State of West Virginia when the same shall become one of the United States, all balances, not otherwise appropriated, that may remain in the treasury, and all moneys not otherwise appropriated, that may come into the treasury up to the time when the said State of West Virginia shall become one of the United States; *Provided, however,* That when the said State of West Virginia shall become one

of the United States, it shall be the duty of the auditor of this State, to make a statement of all the moneys that up to that time, have been paid into the treasury from counties located outside of the boundaries of the said State of West Virginia, and also of all moneys that up to the same time, have been expended in such counties, and the unexpended surplus of all such moneys shall remain in the treasury and continue to be the property of this State."

(R., pp. 5, 6.)

It is alleged that the sum of one hundred and fifty thousand dollars, "together with other sums belonging to the State of Virginia," were received or collected by the State of West Virginia after its formation.

Again it is alleged that:

"The State of West Virginia has, since her creation as a State, received from the State of Virginia real and personal property, amounting in value to many millions of dollars, and held and enjoyed the same, but upon expressed condition that she should duly account for the same in a settlement thereafter to be had between her and the Commonwealth of Virginia."

(R., p. 10.)

It is alleged in the bill that on the 20th day of August, 1861, the Commonwealth of Virginia, in convention assembled, at the city of Wheeling, adopted an ordinance "to provide for the formation of a new State out of the portion of the territory of this State," and that the ninth section of the ordinance was as follows:

"The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, 1861, to be ascertained by charging to it all the State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State Government since any part of said debt was contracted, and deducting therefrom the moneys paid into the treasury of the commonwealth from the counties included within the said new State during said period. All private rights and interests in lands within the proposed State, derived from the laws of Virginia prior to such separation shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in the State of Virginia."

(R., p. 4.)

It is then alleged that the new State was admitted into the Union on the 20th day of June, 1863, under a constitution which contained the following provisions:

"5. No debt shall be contracted by this State except to meet casual deficits in the revenue, to redeem a previous liability of the State, to suppress insurrection, repel invasion, or defend the State in time of war."

"7. The legislature may, at any time, direct a sale of the stocks owned by the State, in banks and other corporations, but the proceeds of such sale shall be applied to the liquidation of the public debt, and hereafter the State shall not become a stockholder in any bank."

"8. An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this State, and the legislature shall ascertain the same as soon as may be practicable and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

(R., p. 6.)

It is shown by the bill that the State of Virginia has settled with the holders of the old public debt by issuing new bonds for two-thirds of the principal and interest, which was decided by the State herself to be her equitable proportion of the debt, and issuing certificates for the other one-third which was assumed by the State of Virginia and by her creditors to be the portion for which West Virginia was liable, and it is stated that—

"By each of the acts for the settlement of her debt above recited, it was provided that the bonds of undivided Virginia so far as not funded in the new obligations given by your oratrix, should be surrendered to and held by your oratrix, who either by the express terms of the settlement provided for by said acts, or as a just and equitable consequence therefrom, received and holds said original bonds so far as unfunded, *in trust*, for the creditor who deposited the same with her, or his assigns; and certificates to this effect were given by your oratrix to each creditor whose old Virginia bond was so surrendered to her."

(R., p. 8.)

And it is also alleged that—

"All of the bonds and obligations and other evidences of the indebtedness of the original State of Virginia outstand-

ing and contracted on January 1, 1861, as stated in paragraph I of this bill, except a comparatively insignificant sum, not amounting to one per cent. of the aggregate of those liabilities, have been taken up and are now actually held by your oratrix, and she has the right to call upon West Virginia for a settlement with respect thereto."

(R., p. 9.)

It is averred in paragraph one of the bill that on the 1st day of January, 1861, the State was indebted "in about the sum of \$33,000,000," and that in addition to this "there was a large indebtedness evidenced by her bonds and other liabilities held by and due to the commissioners of the sinking fund and the literary fund of the State," the former amounting to \$1,462,993.00 and the latter to \$1,543,669.05, as of the same date.

(R., p. 1.)

The several acts of the legislature under which the debt was adjusted and the contracts under which the certificates issued by the State have been deposited with a commission, *in trust for the purpose of bringing this suit*, are exhibited with and made part of the bill, and it is alleged that "this suit has been instituted at the request and direction of the said commission and in strict conformity with the provisions of the said act of March 6, 1900," which act will be hereafter referred to in this brief.

In the preamble to the act of March 30, 1871, which was the first one passed by Virginia to provide for the funding and payment of two-thirds of the debt, it was recited, among other things, that—

"Whereas it has been suggested that the authorities of West Virginia may prefer to pay that state's portion of said debt to the holders thereof *and not to this State, as the constitution of this State provides*; now, therefore, to enable the State of West Virginia to settle her proportion of said debt with the holders thereof, and to prevent any complications or difficulties which might be interposed to any other manner of settlement, and for the purpose of promptly restoring the credit of Virginia by providing for the prompt and certain payment of the interest upon her proportion of said debt as the same shall become due; therefore be it enacted," etc., etc.

(R., pp. 13, 14.)

The third section provided that—

"Upon the surrender of the old and the acceptance of

the new bond for two-thirds of the amount due as provided in the last preceding section, there shall be issued to the owner or owners, for the other one-third of the amount due upon the old bond, stock, or certificate of indebtedness so surrendered, a certificate bearing the same date as the new bond, setting forth the amount of the bond which is not funded as provided in the last preceding section, and that payment of said amount with interest thereon at the rate prescribed in the bond surrendered, will be provided for in accordance with such settlement as shall hereafter be had between the States of Virginia and West Virginia in regard to the public debt of the State of Virginia existing at the time of its dismemberment, and that the State of Virginia holds said bonds, so far as unfunded, *in trust* for the holder or his assigns."

(R., p. 15.)

It appears from one of the exhibits attached to and made part of the bill that the certificates issued to the creditors under the provisions of this act were as follows:

"This is to certify that there is due unto ——— ——— heirs, executors, administrators or assigns \$——, being one-third of bond surrendered under the provisions of an act approved March 30th, 1871, entitled, 'An act to provide for the funding and payment of the public debt,' namely, bond No. —, with interest, amounting to \$—. Payment of said one-third with interest thereon at the rate of six per cent. per annum will be provided for in accordance with such settlement as shall hereafter be had between the States of Virginia and West Virginia in regard to the public debt of the State of Virginia existing at the time of its dismemberment, and the State of Virginia holds said bonds so far as unfunded *in trust* for the holder hereof or his assigns."

(R., pp. 47, 48.)

The fourth section provides, among other things, that—

"The treasurer shall, by proper endorsement, written or stamped, upon each bond, certificate of stock, or interest certificate so surrendered and delivered to him, *cancel the same*, and endorse thereon the date of such cancellation, and shall preserve the same in his office until otherwise directed by law."

This act provided for funding two-thirds of the public debt and interest in bonds bearing interest at the rate of 6 per cent.; but subsequently, on March 28, 1879, another act, prescribing a plan of set-

tlement, was passed, which provided for the issue of twenty-year bonds bearing interest at the rate of 4 per cent. and ten-year bonds bearing interest at the rate of 5 per cent.

The sixth section of that act provided that—

“The rules prescribed under the act approved March thirtieth, eighteen hundred and seventy-one, in respect to preparing, signing and issuing the new bonds and coupons, regulating the same, and in taking in, *cancelling* and registering the old bonds, shall be observed by the officers of the treasury in the execution of this act, except so far as the same be modified by the provisions of this act. * * * But in *cancelling* and registering the bonds as above directed, in every bond and coupon surrendered under this act holes shall be punched in one or more places, and in such a manner as to render a new funding of the same impossible, and every bond and coupon so *cancelled* shall be filed for reference.”

(R., pp. 18, 19.)

And in the seventh section of that act it is provided that—

“The owners of all classes of bonds mentioned in this act, who shall exchange their securities for the bonds created under this act, and who shall not have yet received certificates representing the remaining one-third of their principal and interest, due and payable by the State of West Virginia, shall receive certificates of a like character to those issued under the act of March thirtieth, eighteen hundred and seventy-one, when they make such exchange; and the State of Virginia will negotiate or aid the creditors holding all of such certificates issued under this act, or previous acts, in negotiating with the State of West Virginia for an amicable settlement of the claims of such creditors against the State of West Virginia. The acceptance of the said certificates for West Virginia's one-third, issued under this act, shall be taken and held as a *full and absolute release of the State of Virginia from all liability on account of said certificates.*”

February 14, 1882, another act was passed entitled “An act to ascertain and declare Virginia's equitable share of the debt created before and actually existing at the time of the partition of her territory, resources,” etc., etc. This act again provided for refunding only two-thirds of the old debt and interest at 3 per cent., and it was enacted that—

“For all balances of such indebtedness, constituting West

Virginia's share of the old debt, principal and interest, in the settlement of Virginia's equitable share as aforesaid, the said board of sinking fund commissioners shall issue a certificate, as follows:

"No.—

"The Commonwealth of Virginia has this day discharged her equitable share of the (registered or coupon, as the case may be) bond for ——— dollars, held by ———, dated the ——— day of ———, and numbered ———, leaving a balance of ——— dollars, with interest from ———, to be accounted for by the State of West Virginia, *without recourse upon this commonwealth.*"

In section 8 it was provided that—

"All the bonds and certificates of debt and evidences of past-due and unpaid interest taken in under the provisions of this act, shall be *canceled* by the treasurer in the presence of the board of the commissioners of the sinking fund as the same are required (acquired), and by the treasurer the same shall be carefully preserved until such time as the General Assembly may otherwise direct. A schedule of the bonds, certificates and other evidences of debt so canceled, from time to time, shall be certified by said board and filed with the treasurer for preservation."

(R., p. 29.)

This act also provided that after its passage "no bonds, certificates, or other evidences of indebtedness, shall be issued for any portion of the debt of this State, nor shall any interest be paid upon any part or portion of said debt, except as hereinbefore provided."

(R., p. 30.)

February 20, 1892, an act was passed to refund at least \$23,000,000 of the outstanding debt which had not been presented in exchange for new bonds under the act of February 14, 1882. Like the others, this act provided for only two-thirds of the principal and interest of the debt, then outstanding, and by the sixth section it was enacted that—

"For all balances of indebtedness, constituting West Virginia's share of the old debt, principal and interest, in the settlement of Virginia's equitable share of the bonds authorized to be exchanged under this act, the said share having been heretofore determined by the Commonwealth of Virginia, the said commissioners shall issue certificates substantially in the following form, viz:

“No. —.

“The Commonwealth of Virginia has this day discharged her equitable share of the (registered or coupon, as the case may be), bond for ——— dollars, dated ——— day of ———, and No. ———, leaving a balance of ——— dollars, with interest from ——— ———, to be accounted for to the holder of this certificate by the State of West Virginia, *without recourse upon this Commonwealth.*”

(R. p. 35.)

In the ninth section it was provided that—

“All the bonds and certificates of debt, and evidences of past due and unpaid interest, taken in under the provisions of this act, shall be *cancelled* by the treasurer in the presence of the commissioners of the sinking fund, or a majority thereof, as the same are acquired, and by him carefully preserved, subject to disposition by the General Assembly; a schedule of the bonds, certificates, and other evidences of debt so cancelled shall be certified by said commissioners and filed by the treasurer for preservation.”

(R., p. 37.)

In the tenth section it is enacted, among other things, that—

“All bonds of the State issued under the provisions of the act aforesaid, approved February fourteenth, eighteen hundred and eighty-two, and now held by said commissioners of the sinking fund, shall, as soon as at least fifteen million of dollars of new bonds shall have been issued and delivered pursuant to the provisions of this act be *cancelled* by said commissioners and preserved in the office of the treasurer of the Commonwealth.”

(R., p. 37.)

March 6, 1894, the legislature of Virginia passed a joint resolution, the preamble to which, after reciting the titles of the acts to which we have heretofore referred, declared:

“Whereas in each of said acts provision is made for issuing to creditors of the original State of Virginia who should accept the new bonds provided for by said several acts, certificates for such proportion of the obligation surrendered by them as was deemed proper to be borne by the State of West Virginia, to-wit: one-third of the amount of said obligations, of which certificates this State holds a large amount, through the agency of the commissioners of its sinking and literary fund; and

"Whereas the present State of Virginia has settled and adjusted, to the entire satisfaction of her people and the creditors, the liability assumed by her on account of two-thirds of the debt of the original State; now, therefore, be it resolved," etc.

(R., p. 40.)

This resolution provided for the appointment of a commission of seven members, which was—

"authorized and directed to negotiate with the State of West Virginia a settlement and adjustment of the proportion of the public debt of the original State of Virginia proper to be borne by West Virginia.

"But said commission shall not proceed with said negotiation until assurances satisfactory to the commission shall have been received from the holders of a majority in amount of said certificates, exclusive of those held by the State through the agency of the board of education and sinking fund commissioners, that they desire the said commission to enter into and undertake such negotiation, and will accept the amount so ascertained to be paid by the State of West Virginia in full settlement of the one-third of the debt of the original State of Virginia which has not been assumed by the present State of Virginia. *But said commission shall in no event enter into any negotiation thereunder except upon the basis that Virginia is bound only for the two-thirds of the debt of the original State, which she has already provided for as her equitable proportion thereof.*

"All expenses incurred by said commission and said board of arbitrators, including reasonable compensation of the members thereof, shall be paid out of the proceeds of such settlement, or by the holders of said certificates who are the beneficiaries of such settlement, but without subjecting the State to any expense on this account. And their action shall be subject to the approval or disapproval of the General Assembly, and shall not be binding on the State until approved by the General Assembly. The governor is requested to communicate this joint resolution to the governor and legislature of West Virginia."

(R., pp. 40, 41.)

Commissioners were appointed under this resolution, but, no adjustment having been made, the act of March 6, 1900, was passed, entitled—

"An act to provide for the settlement with West Virginia of the proportion of the public debt of the original State of Virginia proper to be borne by West Virginia, and for the

due protection of the Commonwealth of Virginia in the premises."

The preamble to the act, after reciting the titles of acts previously passed, is as follows:

"Whereas in each of said acts provision is made for issuing to creditors of the original State of Virginia who should accept the new bonds provided for by said several acts, certificates for such proportion of the obligation surrendered by them as was deemed proper to be borne by the State of West Virginia, to-wit: one-third of the amount of said obligations, of which certificate this State holds a large amount, through the agency of the commissioners of its sinking fund; and

"Whereas the General Assembly is required by the constitution of Virginia to provide by law for adjusting with the State of West Virginia the proportion of the debt of the original State of Virginia proper to be borne by West Virginia, but no such adjustment has ever been had; and

"Whereas it appears that while Virginia has satisfactorily settled the two-thirds of the original debt *which she assumed*, yet it is possible that complications will arise with respect to said certificate which will render it desirable that she should endeavor to secure an adjustment thereof upon terms which will protect herself, but will work no injustice to West Virginia, and thus finally dispose of the only question remaining unsettled in connection with said debt; now therefore, be it enacted," etc.

The first section provided—

"That the commission created and appointed under a joint resolution of the General Assembly entitled a joint resolution to provide for adjusting with the State of West Virginia the proportion of the public debt of the original State of Virginia proper to be borne by West Virginia, for the application of whatever may be received from West Virginia to the payment of those found to be entitled to the same, approved March sixth, eighteen hundred and ninety-four, be, and said commission hereby is, authorized to receive and take upon deposit the certificates aforesaid or have the same otherwise placed or held on deposit subject to their control upon an agreement and contract on the part of the holders of said certificates that if the said commission will secure a settlement with West Virginia with respect to said certificates the said holders of said certificates so deposited *will accept the amount realized on such settlement*

from West Virginia on said certificates as a full settlement of all their claims thereunder."

(R., p. 42.)

The second section provided that —

"If at least two-thirds in amount of the said certificates issued under the act of eighteen hundred and seventy-one, exclusive of those held by the State through the agency of the board of education and the sinking fund commissioners, and at least a majority in amount of all the other certificates aforesaid shall be so deposited or placed subject to the control of the said commission upon the agreement and contract aforesaid, then the said commission shall be authorized and empowered by and with the advice and approval of the attorney-general of Virginia to take such action and institute such proceedings, on behalf of the State, as may in the judgment of said commission and attorney-general be needful and proper to protect the interest of the State and bring about and carry into effect a settlement as aforesaid. All the expenses involved in connection with any of the matters aforesaid shall be borne by the certificate holders, as provided in the joint resolution aforesaid, and the State shall not be subject to any expense on that account."

(R., p. 42.)

The holders of a large amount of certificates issued by Virginia for what she claimed was West Virginia's just proportion of the debt, had deposited their certificates with a committee for collection or adjustment, and on the 20th of July, 1898, the depositing committee through its chairman, made the following proposition to the Virginia commission:

"Whereas your commission was constituted as set forth in said joint resolution and act of assembly for the purpose of negotiating and bringing about a settlement with the State of West Virginia with respect to the proposition of the public debt of the original State of Virginia proper to be borne by West Virginia and in connection with which the present State of Virginia has issued certain certificates under four acts of its General Assembly, approved, respectively March 30th, 1871, March 28th, 1879, February 14th, 1882, and February 20th, 1892.

"And whereas your commission was, under the said act of March 6, 1900, further authorized to receive and take upon deposit the certificates aforesaid, or to have the same otherwise placed or held on deposit subject to your control, upon the agreement and contract on the part of the holders

of said certificates that if your commission would secure a settlement with West Virginia with respect to said certificates, the said holders of said certificates, so deposited, would accept the amount realized on such settlement from West Virginia as a full settlement of all their claims thereunder; and said act further provided that if at least two-thirds of the amount of the said certificates issued under said act of 1871, (exclusive of those held by the State through the agency of the board of education and the sinking fund commissioners) and at least a majority in amount of all the other certificates should be so deposited or placed subject to the control of your commission upon the agreement and contract aforesaid, then your commission should be authorized, by and with the approval of the attorney-general of Virginia, to take action in the premises as might be needful to protect the interests of the State and bring about and carry into effect a settlement as aforesaid.

"And whereas by a certain agreement of July 28th, 1898, a committee on behalf of the holders of the said certificates was constituted to bring about the deposit as far as practicable of said certificates in such depository as the committee should appoint with powers in the committee to act as agent of the certificate holders so depositing in bringing about a settlement of their claims upon such plan, as might be recommended by the advisory board named in said agreement and as should become effective thereunder it being further stated in said agreement that all the said certificates so deposited would be promptly surrendered in exchange for whatever amount West Virginia might agree to pay and the creditors of West Virginia might agree to accept as aforesaid.

"And whereas more than two-thirds in amount of all the said certificates of 1871, outstanding as aforesaid, to wit, \$8,565,095.70 and a majority of all the other certificates aforesaid, to wit, \$1,782,475.13, have been duly deposited with said committee and are in custody of Brown Brothers & Company, bankers of New York city, N. Y., the depository named by said committee, and are held subject to the control of the said committee under the said agreement, so that the same can be duly placed and held subject to the control of your commission in accordance with the said agreement and in pursuance of such plan of settlement as is now proposed or as may hereafter become effective.

"In view of the premises the undersigned, the committee aforesaid, do now hereby tender and place subject to the control of your commission all the aforesaid certificates, so held on deposit, upon the agreement and arrangement on the part of your commission, acting for the State of Virginia under the said joint resolution and act of assembly aforesaid, that your commission will enter into negotiations

with the State of West Virginia or the constituted authorities thereof for the purpose of effecting a settlement with West Virginia with respect—the said certificates in accordance with the said agreement of July 28th, 1898, and in accordance with such plan of settlement as is now proposed or as may hereafter become effective; and that your commission will by and with the advice and approval of the said attorney-general take such action as they may deem needful in the premises; and in event such a settlement is so made, then it is hereby agreed that the amount realized thereon *shall be accepted in full satisfaction of all the claims of the certificate holders thereunder* and the undersigned committee will surrender to your commission, in exchange for such amount the certificates aforesaid so deposited.

“If this proposal be accepted by your commission, the same shall constitute an arrangement and contract with the State of Virginia for obtaining a settlement with West Virginia and the same shall continue binding upon the undersigned committee and upon the holders of said certificates so deposited for the period of three years next ensuing from the date hereof for the purpose of allowing time for a settlement aforesaid; and the same shall be subject to renewal and extension for such further time as may be agreed upon and to such modification and amendment as may be agreed upon, and shall apply to and include any and all such certificates as aforesaid as may hereafter be deposited with and held by the said committee under said agreement of July 28th, 1898.”

(R., pp. 54-56.)

This proposition was accepted by the Virginia commission, with the approval of the attorney-general, on the 18th of September, 1902.

On the 3d of December, 1902, the advisory board of the depositing committee promulgated the following plan of settlement, which was approved by the committee:

“Under an agreement of July, 1898, a committee was constituted for the purpose of assembling the Virginia deferred certificates, with certain powers and functions as in the agreement specified, and by the same agreement an advisory board was constituted whose functions were also specified in the agreement.

“In pursuance of this agreement, a certain plan of settlement was, on the 21st day of June, 1899, formulated and recommended by the committee and advisory board, which among other things, contained the following provision:

“The committee may surrender to either State (Vir-

ginia or West Virginia) any of the deposited certificates and receive in full satisfaction therefor their *pro rata* of such an amount in State bonds, or cash as may be agreed upon between the committee and the representatives of Virginia or West Virginia, as the maximum amount which West Virginia will assume on account of her proportion of the debt of the original State.'

"Since the date last named the General Assembly of Virginia, on the 6th day of March, 1900, passed an act authorizing a commission which had been appointed and constituted on her behalf in the premises, by and with the advice and approval of her attorney-general, to take such action and institute such proceedings as might, in the judgment of the commission and attorney-general, be needful and proper to bring about and carry into effect a settlement of said certificates; but it was further provided in this act that such action should be taken only in the event that at least two-thirds of all the certificates of 1871 (exclusive of those held by the State) and a majority of all the other certificates, should be deposited with or placed subject to the control of the holders of such certificates that if the commission would secure a settlement with West Virginia with respect to said certificates, *they would accept the amount realized from West Virginia on such settlement in full of all their claims thereunder.*

"On the 18th of September, 1902, the committee held on deposit \$8,565,095.70 of the certificates of 1871, being more than two-thirds thereof (*) as above stated, and \$1,782,457.13 of all the other certificates, being a majority thereof; and the committee accordingly on that day entered into a contract with the Virginia commission, by which it was stipulated that the said certificates should, for the period of three years, be held subject to the control of the commission upon the agreement and arrangement on the part of the commission that they would enter into negotiations with the State of West Virginia for the purpose of effecting a settlement with respect to said certificates, and would by and with the advice and approval of said attorney-general, take such action as they might deem needful in the premises; *the amount realized on such settlement to be accepted in full of said certificates* as above stated, which contract was duly approved by the attorney-general of Virginia on September 29th, 1902.

"In view of this act of the Virginia assembly, and of the recent action taken thereunder, it is deemed desirable to make the plan of settlement heretofore recommended more definite with respect to the matters now involved; and to

(*) On March 2nd the figures were \$9,231,602.13 of the certificates of 1871 and \$2,239,451.62 of all the other certificates.

this end the following is hereby formulated, approved and recommended by the committee and the advisory board by way of supplement and addition to the original plan:

"I. The above named committee shall pledge or deposit the certificates now or hereafter received under the agreement of July 28, 1898, with the Virginia commission, in conformity with the act of March 6, 1900, *for the purpose of taking such action and instituting such proceedings, by and with the advice and approval of the attorney-general of Virginia as may be deemed needful to bring about and carry into effect a settlement as in said Act provided*; such pledge or deposit to be such length of time as may be agreed on; and the said agreement of September 18, 1902, shall continue in force for the period therein specified; and the committee may enter into such further agreements with the said commission as may be deemed needful to bring about a settlement in the premises.

"II. In the event that no settlement shall be effected by the Virginia commission either under the agreement of September 18, 1902, within the period therein specified, or under any other agreement which may be entered into between the committee and the said commission within such time as may be limited therein, the committee may, after any and all such agreements with the said commission shall have expired, take such other and further proceedings and make such other and further agreements and settlements in the premises as the committee may deem judicious.

"III. The committee shall be authorized to make such disposition by pledge, sale or otherwise, of the certificates, now or hereafter deposited, under the agreement of July 28, 1898, as may be necessary to carry into effect any proceedings taken and any agreements or settlements made by them as above stated, with or through the said commission or otherwise, or for the payment of expenses now or hereafter to be incurred, whether a settlement is effected or not, not to exceed, however, the limit fixed by said agreement, and may give such release and acquittance as may be necessary to that end.

"The amount realized on or the proceeds of any such settlement, after deducting proper charges under the agreement of July 28, 1898, shall be apportioned and distributed among the different certificate holders in such manner and according to such percentages as may be ascertained and established for the different classes of certificates by a tribunal to be constituted as follows: one member thereof to be appointed by the committee, one member by the advisory board, and the third by the two so appointed; and if it be impracticable in the judgment of such tribunal to distribute in kind any bonds or securities which may be received in any such settlement, then the same may be sold and con-

verted into money for the purpose of such distribution. If a vacancy occur in such tribunal the same shall be filled by the remaining members.

"New York, December 3d, 1902."

This agreement was signed by the members of the advisory board and the chairman of the committee.

On the 14th day of December, 1904, an additional agreement was made between the depositing committee and the Virginia commission, which extended indefinitely as to time by contracts made September 9, 1905 and November 24, 1905. The said contracts are as follows:

"Memorandum of agreement, made this 14th day of December, 1904, between the depositing committee of the securities known as the Virginia deferred certificates as constituted under the contract of July 28th, 1898, and of which John Crosby Brown is chairman, and Robert L. Harrison, secretary, acting under the plan of settlement approved on December 3rd, 1902, by the advisory board referred to in the said contract hereinafter referred to as the depositing committee, party of the first part, and the commission constituted on behalf of the State of Virginia for the purpose of bringing about a settlement with the State of West Virginia with respect to said certificates as constituted and acting under the joint resolution of the General Assembly of the State of Virginia, approved March 6, 1894, and the act of said General Assembly, approved March 6, 1900, and of which John B. Moon is chairman, and Joseph Button is secretary, hereinafter referred to as the Virginia commission, party of the second part:

"Whereas, by an agreement entered into between the above parties on the 18th day of September, 1902, certain of the certificates aforesaid amounting in the aggregate to \$10,347,570.85 were tendered by the depositing committee aforesaid to the said Virginia commission, and were placed subject to the control of the said commission upon the agreement and arrangement on the part of the said commission acting for the State of Virginia under the said joint resolution and act of assembly aforesaid, that the said commission should enter into negotiations with the State of West Virginia or the constituted authorities thereof for the purpose of effecting with West Virginia a settlement with respect to the said certificates, *in accordance with the said contract of July, 28th, 1898*, and in accordance with such plan of settlement as was then proposed or might thereafter become effective, and that the said commission would, by and with the advice and approval of the attorney-general

of Virginia, take such action as they might deem needful in the premises; and that in the event such a settlement was so made, then it was *agreed that the amount realized thereon should be accepted in full satisfaction of all the claims of the certificate-holders thereunder*, and that the said committee would surrender to the said commission, in exchange for such amount, the certificates so placed subject to the control of said commission. And it was further specified in the said agreement of September 18, 1902, that the same should apply to and include all such certificates as might thereafter be deposited with and held by the said committee under the said contract of July 28, 1898, and that the said agreement should constitute an arrangement and contract between the said committee acting for the said certificate-holders with the State of Virginia for obtaining a settlement with West Virginia, and that the same should continue binding upon the parties and upon the holders of the certificates so deposited for the three years next ensuing from the date of the said agreement; that is to say, until the 18th day of September, 1905. And the said agreement further provided that the same should be subject to renewal and extension for such further time as might be agreed upon between the parties and to such modification and amendment as might thereafter be agreed upon; and

"Whereas, the said agreement of September 18, 1902, was approved by the Hon. William A. Anderson, attorney-general of Virginia, by his endorsement at the foot thereof on the 29th day of September, 1902; and

"Whereas, the provisions of the said agreement last named were fully approved and recommended on the 3rd day of December, 1902, by the advisory board referred to in the said contract of July 28, 1898, as appears by the plan of settlement made and approved by the said committee and the advisory board and bearing date December 3rd, 1902, of which plan of settlement publication was duly made as provided in the said contract of July 28, 1898, and no notification whatsoever was given to the said committee, either directly or through any depository, by any of the holders of the deposited certificates, of their unwillingness to accept the proposed settlement as set forth in the said plan so published and more than thirty days having elapsed after the said publication was completed, and the said plan of settlement having therefore become complete; and of this fact the declaration in writing of the committee having been duly made to the only depository under the said contract, to wit, Messrs. Brown Brothers & Company, of 29 Wall street, New York, the said plan of settlement thereupon became effective and final; and

"Whereas, it is now proposed under the terms of the said agreement of September 18, 1902, and by way of modifica-

tion thereof as therein provided, to place more fully and completely under the control of the said Virginia Commission all the certificates aforesaid which had up to that date been deposited, and also all thereafter deposited so that the said Virginia commission may be given full and complete control of all the said certificates in their proposed negotiations with the State of West Virginia, and also in any action and proceeding which may be taken or instituted by the said Virginia Commission by and with the advice and approval of the said attorney-general under the said act of the General Assembly of Virginia March 6, 1900:

"Now therefore this agreement witnesseth: that the aforesaid depositing committee does hereby authoriz and direct their said depository Messrs. Brown Brothers & Company to issue to the Virginia Debt Commission a certificate that all the aforesaid Virginia deferred certificates which have up to this time been deposited with the said Brown Brothers and Company under the said depositing agreement of July 28, 1898, and all which may hereafter and before the 18th day of September, 1905, be so deposited with the said depository are held by the said depository on deposit for and subject in all respects to the control and disposition of the said Virginia Commission *in pursuance of the said joint resolution and act of the General Assembly of Virginia*; and to this end the said Messrs. Brown Brothers & Company are authorized and instructed to issue such certificate to the said Virginia Commission in such form as to show that all of the certificates aforesaid have been received and are held by them on deposit for the said Virginia Commission and subject to the control and disposal of the said commission:

"But this agreement shall continue in force only until the said 18 day of September, 1905, when the said certificate issued by the said Brown Brothers and Company to the said Virginia commission for the purpose of making a settlement with West Virginia as aforesaid shall be returned to the said depositing committee, unless a settlement shall have been before that time negotiated with West Virginia in pursuance of said contract of September 18th, 1902, or unless negotiations be then pending with the properly constituted authorities of West Virginia for such settlement upon some equitable basis which has been agreed to by said commission and the authorities of West Virginia aforesaid. *Provided, however*, That it is fully understood and agreed that the time for continuing in force this agreement may be extended by the consent and agreement of the parties hereto indorsed hereon or at the foot hereof, for such length of time and upon such conditions as the parties may hereafter specify; and this agreement may be changed, modified and amended with respect to the action and proceedings to be

taken or instituted by the said commission in the premises, as may hereafter be agreed upon by the parties and then indorsed as aforesaid, or as may be specified in a further and supplemental agreement between the parties.

"In testimony whereof the signatures of the chairman of the said depositing committee and of the Virginia Commission, attested by the respective secretaries thereof, are hereunto affixed on the day and year first above written

"JOHN CROSBY BROWN, *Chairman.*

"ROBERT L. HARRISON, *Secretary.*

"JOHN B. MOON,

"*Chairman of Virginia Commission.*

"JOSEPH BUTTON, *Secretary.*"

"The foregoing agreement is hereby approved as having been entered into by my advice and approval.

"WILLIAM A. ANDERSON,

"*Attorney-General of Virginia.*

"Dated December 14, 1904."

"The foregoing agreement of December 14th, 1904, together with the contract of September 18th, 1902, therein referred to, are hereby extended in all their provisions until December 1st, 1905, and they shall remain in full force until that date just as if December 1st, 1905, instead of September 18th, 1905, had been the date originally named therein for their limitation, with the right of extension, enlargement and modification on or before December 1st, 1905, in all respects as therein specified.

"Given under our hands this 9th day of September, 1905.

"JOHN CROSBY BROWN,

"*Chairman Depositing Committee.*

"ROBT. L. HARRISON, *Secretary.*

"JOHN B. MOON,

"*Chairman Virginia Commission.*

"JOS. BUTTON, *Secretary.*"

"The above extension of the contracts above referred to is hereby approved this 9th day of September, 1905.

"WILLIAM A. ANDERSON,

"*Attorney General of Virginia.*"

"Upon the execution of the foregoing contract of December 14, 1904, hereto annexed, Messrs. Brown Bros. & Co., bankers of New York, N. Y., the depository referred to in said contract, issued to the Virginia Commission therein named the certificate provided for in said contract, which was also in the form of a receipt and showed that Virginia deferred certificates of 1871 to the amount of \$10,639,776.42 and certificates of other dates to the amount of \$2,270,779.47

were held by said Brown Bros. & Co. on deposit for and subject to the control and disposal of said commission; thus placing subject to the complete control and disposal of the commission considerably more than two-thirds of the total of \$12,703,451.79 of the certificates of 1871 outstanding and in the hands of the public, and a large majority of the total of \$2,778,239.80 of the other certificates so outstanding.

"Thereafter, in January and February, 1905, the Virginia Commission, through its properly constituted sub-committee acting with the attorney-general of Virginia, made to the governor and attorney-general of West Virginia, and to the finance committees of the legislature of that State, which was then in session, a full statement and presentation of the matters outstanding and unsettled between the two States in connection with the deferred certificates aforesaid, accompanied by an urgent plea on behalf of the State of Virginia that the legislature of West Virginia would, at least, appoint a committee or other public functionary with authority to take up the questions involved for the purposes of discussion and negotiation, but the commission was again met, as it had been in a previous attempt to open negotiations on the subject, by an absolute refusal on the part of the authorities of West Virginia to treat on the subject at all; thus leaving to the Virginia Commission and attorney-general of that State no possible means of bringing about the settlement, which they are charged with the responsibility of making, except by a resort to the court having jurisdiction of controversies between States.

"Now, therefore, it is hereby stipulated and agreed by and between the depositing committee, named as the party of the first part in the said foregoing contract of December 14th, 1904, and the Virginia Commission therein named as the party of the second part, the said commission acting in this behalf by and with the advice and approval of the attorney-general of Virginia, that in accordance with the provisions contained in the said foregoing contract and addendum thereto of September 9th, 1905, the same is hereby amended, modified and extended as follows, to wit:

"1st. Neither the said foregoing contract of December 14th, 1904, nor the contract therein referred to between the same parties, bearing date September 18th, 1902, shall expire on the 1st day of December, 1905, but the same shall continue in force in all respects just as if no time limit had been named in either of said contracts, and this agreement shall be taken as a continuation, modification and extension of said contracts.

"2nd. The certificate or certificates heretofore given by Brown Bros. & Co., the depository of the said committee, to the said Virginia Commission, covering the deferred certificates aforesaid, shall be retained by the said commission and

shall remain in full force and effect without regard to time limit; and the said Brown Bros. & Co. shall issue and give to the said commission such other and further certificates and receipts in the premises, by way of amendment or in lieu of those already given or otherwise, as may be deemed needful or desirable in order to place said deferred certificates more completely and finally under the control and at the disposal of the said commission for the purpose of carrying out this agreement; and especially shall they give such certificates or receipts to cover all such Virginia deferred certificates as have been or may be deposited with them and not covered by certificates or receipts previously given to the commission; and the said Virginia Commission are hereby given and *invested with the full and complete control and right to dispose of all deferred certificates now or hereafter covered by or embraced in the receipts and certificates of Brown Bros. & Co. as aforesaid.*

“3rd. The said Virginia Commission hereby stipulate and agree, by and with the advice and approval of the attorney-general of Virginia, that, in their judgment, it is needful and proper, in order to protect the interest of the State and bring about and carry into effect a settlement in the premises, *that a suit should be instituted in the name of the State of Virginia against the State of West Virginia in the Supreme Court of the United States asking for an adjudication and settlement by that court of the matters aforesaid unsettled and undetermined between the two States, arising or growing out of the debt of the original State of Virginia before its dismemberment and on account of which said deferred certificates were issued, the same to be brought and instituted as provided in the act of the General Assembly of Virginia, of March 6th, 1900, referred to in said contract of December 14th, 1904; and the said Virginia Commission acting by and with the advice and approval of the attorney-general of that State, do hereby undertake and agree that such a suit shall be brought against the State of West Virginia for the purpose of obtaining a settlement as aforesaid, as soon as the pleadings, papers and documents relating thereto can be conveniently and properly drawn up and prepared for presentation to the said court, which said suit shall be instituted, conducted and proceeded with in all respects in accordance with the provisions of the said act of the General Assembly of Virginia and the joint resolution of the said General Assembly of March 6th, 1894, also referred to in said contract of December 14th, 1904; but the power to make and carry into effect a settlement and adjustment in the premises by agreement with West Virginia as to the deferred certificates placed subject to the control of the commission as aforesaid, as provided in the previous contracts aforesaid, shall remain vested in the said*

commission, notwithstanding the institution and pendency of such suit.

"4th. And the Virginia Commission do further undertake and agree that, in accordance with the terms and conditions of the said joint resolution and act of the General Assembly of Virginia, *they will account for, pay over and deliver such amount, either in cash or securities*, as may be realized from West Virginia through any settlement made by the said commission with that State, either by means of an adjudication or recovery in said suit or otherwise, for or on account of the deferred certificates now or hereafter deposited and placed subject to their control as aforesaid, *to the said depositing committee in full settlement and satisfaction of all claims under said certificates*; and the said depositing committee agrees on behalf of the depositors of said deferred certificates so placed subject to the control of the said commission and on behalf of those entitled to the benefit of said certificates as assignees of said depositors or otherwise to accept as aforesaid such amount, either in cash or securities, as may be determined or ascertained in any such suit to be due by, or as may be realized through any adjustment or settlement as aforesaid from the State of West Virginia on account of the said certificates and on account of the bonds represented by and mentioned in the said certificates respectively, *in full settlement and satisfaction of all claims on account of said certificates and on account of the bonds therein mentioned*, and to accept and take such adjudication against the State of West Virginia in full discharge and acquittance of all claims in the premises against the State of Virginia.

"5th. It is further understood and agreed that if from any cause the said commission shall fail or be unable to bring about such adjustment or settlement or to obtain a determination or ascertainment of the liability of West Virginia as hereinbefore provided for, then it shall be the duty of the said commission to restore to the control of the said depositing committee all such deferred certificates as may have been placed subject to the control and disposal of said commission as aforesaid.

"RICHMOND, VA., November 24th, 1905."

This contract was signed by all the members of the depositing committee and the Virginia Commission, and approved by the attorney-general on the day of its date.

It appears from one of the exhibits attached to and made a part of the bill that the total amount of certificates issued by Virginia on account of West Virginia's alleged proportion of the public debt was as follows:

Under the act of 1871.....	\$15,281,970.47
Under the act of 1879.....	564,258.87
Under the act of 1882.....	1,775,603.48
Under the act of 1892.....	605,320.78
Total	\$18,227,153.60
(R., p. 90.)	

It appears that on January 4, 1906, certificates to the amount of \$13,173,435.41 had been deposited by the committee with Brown Brothers and Company, and that they have been withdrawn by the Virginia Commission and are now in its custody or under its exclusive control.

For the owners of the whole amount of certificates issued, whether they have or have not been deposited with the committee or with the commission, Virginia sues as trustee in this case under the contracts and statutes to which we have referred.

The prayer of the bill is as follows:

“Forasmuch, therefore, as your oratrix is remediless save in this form and forum, and to the end that the State of West Virginia may be duly served, through her governor and attorney-general, with a copy of this bill, your oratrix prays that the said State of West Virginia may be made a party defendant to this bill, and required to answer the same, that all proper accounts may be taken to determine and ascertain the balance due from the State of West Virginia to your oratrix, in her own right *and as trustee as aforesaid*; that the principles upon which such accounting shall be had may be ascertained and declared, and a true and proper settlement made of the matters and things above recited and set forth; that such accounting be had and settlement made under the supervision and direction of this court by such auditor or master as may by the court be selected and empowered to that end, and that proper and full reports of such accounting and settlement may be made to this court; that the State of West Virginia may be required to produce before such auditor or master, so to be appointed, all such official entries, documents, reports and proceedings as may be among her public records or official files and may tend to show the facts and the true and actual state of accounts growing out of the matters and things above recited and set forth, in order to a full and correct settlement and adjustment of the accounts between the two States; that this court will adjudicate and determine the amount due to your oratrix by the State of West Virginia in the premises; and that

all such other and further and general relief be granted unto your oratrix in the premises as the nature of her case may require or to equity may seem meet."

The bill has been demurred to on the following grounds:

First. That it appears by said bill that there is a misjoinder of parties plaintiff and a misjoinder of causes of action. The said bill is brought by the Commonwealth of Virginia to recover debts alleged to be due to her in her own right from the defendant for property and money alleged to have been transferred and delivered to the defendant under certain acts of the legislature passed in 1863, and also, as trustee for the owners of certain certificates mentioned and described in said bill, to have an accounting to ascertain and declare the amount claimed to be due from the defendant as her just proportion of the public debt of the plaintiff prior to the first day of January, 1861.

Second. That this court has no jurisdiction of either the parties to or the subject-matter of this action, because it appears by the said bill that the matters therein set forth do not constitute, within the meaning of the Constitution of the United States, such a controversy, or such controversies, between the Commonwealth of Virginia and the State of West Virginia as can be heard and determined in this court, and this court has no power to render or enforce any final judgment or decree thereon.

Third. That it appears by said bill that the plaintiff herein sues as trustee for the benefit of a number of individuals who are the alleged owners of certain certificates in the said bill set forth and described.

Fourth. That the said bill does not state facts sufficient to entitle the Commonwealth of Virginia to the relief prayed for, or to any relief, either in her own right or as trustee for the owners of the certificates therein set forth and described.

Fifth. That it does not appear by said bill that the attorney-general has ever been authorized to institute and prosecute this suit in the name of the Commonwealth of Virginia in her own right, but only as trustee for the use and benefit of the owners of certain cer-

tificates mentioned in the act of March 6, 1900, which is referred to and made part of said bill.

Sixth. That the said bill does not sufficiently and definitely set forth the claims and demands relied upon, but the allegations thereof are so indefinite and uncertain that no proper answer can be made thereto.

Seventh. That the allegations in the said bill are not sufficient to entitle the plaintiff therein, either in her own right or as trustee, to an account or to a discovery from this defendant.

Eighth. That the said bill does not contain any prayer for a judgment or decree or any other final relief against this defendant.

The first question to be considered in the case is whether this court has jurisdiction to hear and determine the causes of action, or any of the causes of action, alleged in the bill, for if no cause of action is alleged upon which the plaintiff is entitled to a judgment or decree in this court, it will not decide any of the other questions presented by the demurrer. Jurisdiction is the power to hear and determine a cause between the parties to the action who are before the court, and to render a final judgment or decree and enforce its execution by judicial process. Judicial tribunals cannot take cognizance of controversies merely for the purpose of ascertaining and declaring what the legal or equitable rights of the parties are. They must render judgments or decrees which remedy the wrongs complained of, or enforce the rights ascertained in the case; in other words, their powers are remedial, not merely declaratory.

Jurisdiction is defined by Bouvier as "the authority by which judicial officers take cognizance of to decide causes. Power to hear and determine a cause (3 Ohio, 494; 6 Pet., 591). The right of a judge to pronounce a sentence of the law on a cause or issue before him acquired through due process of law. It includes power to enforce the execution of what is decreed. (8 Johns., 239; 3 Met., Mass., Thach., 202). (2 Bouvier Law Dic., 26).

In defining jurisdiction, Black says:

"The power and authority constitutionally conferred upon or constitutionally recognized as existing in a court or judge to pronounce the sentence of the law or to award the remedies provided by law upon the set of facts proved or admitted,

referred to the tribunal for decision and authorized by law to be the subject of investigation or action by that tribunal, and in favor or against persons (or a *res*) who present themselves, or who are brought before the court in some manner sanctioned by law as proper and sufficient. Jurisdiction is a power constitutionally conferred upon the judge or magistrate to take cognizance of and determine a cause according to law and to carry a sentence into execution (6 Pet., 591; 9 Johns., 239; 2 Neb., 135)."

Black's Law Dictionary, page 63. See also Anderson's Words and Phrases, page 3877-813; also Am. & Eng. Ency., vol. 17, page 1041; *Daniels v. Tearney*, 102 U. S., 418; *Applegate v. Lexington, etc.*, 117 U. S. 267; *Simmons v. Saul*, 138 U. S. 454; *Holmes v. Oregon*, 5th Fed., 534; 9th Fed., 32; 6 Sawyer, 385; *Grignon v. Aston*, 2 How. 385; *U. S. v. Arradondo*, 6 Pet., 691; *Decatur v. Paul*, 14 Pet., 599; *In re Bogart*, 2 Sawyer, 491; 3 Fed. Cases, No. 596; 1 *Le Roy v. Clayton*, 2 Sawyer, 499; 15 Fed. Cases, No. 8258; *Riggs v. Johnson County*, 6 Wall., 187; *McNitt v. Turner*, 6 Wall., 366; *Cornett v. Williams*, 20 Wall. 240.

The bill, so far as it relates to the old debt of Virginia, although it sets up all the provisions of the compact, seems to be framed upon the theory that West Virginia is liable for one-third of the debt as it existed prior to the first day of January, 1861, upon the alleged ground that the formation of the new State diminished the territory and population of the original or parent State to that extent. It is evident, however, that no such rule can be applied here, for this is not a case in which West Virginia's "just proportion" of the debt is to be determined upon such rules or principles as a court may decide to be fair and equitable, but is to be ascertained and paid according to a method agreed upon by the parties; and that method must be observed, whether the action is prosecuted at law or in equity. The liability of the defendant State, if any exists, is founded entirely upon a compact entered into between the two States with the consent of Congress, and the adjustment must therefore be made according to its terms. No rule, or supposed rule, of international law can be applied in such a case.

By the ordinance of the Wheeling convention, which represented the State of Virginia, consent was given to the formation of a new State out of a part of her territory, and it was provided, as we have already seen, that it should take upon itself a just proportion of the public debt of Virginia existing prior to the first of January, 1861, which, according to the ordinance, was to be ascertained by charging

to the new State all the State expenditures within the limits thereof and a just proportion of the ordinary expenses of the State government since any part of the debt was contracted, and deducting therefrom the moneys paid into the treasury of the State of Virginia during that period from the counties included within the new State.

It was also provided that all private rights and interests in lands within the proposed new State derived from the laws of Virginia prior to the separation should remain valid and secure under the laws of the proposed State and should be determined by the laws then existing in the State of Virginia. At the time of the passage of this ordinance there was, of course, no State of West Virginia, and therefore no second party to the proposed compact or agreement. Subsequently the people inhabiting the counties proposed to be included in the new State held a sovereignty convention and adopted a constitution preparatory to admission into the Union. This was the first time the new State, or proposed new State, had the capacity to assent to, or dissent from, the proposition submitted by Virginia, and it assented to it with the qualification, or addition, that its equitable proportion of the debt should be ascertained by its own legislature as soon as practicable, and that the legislature should provide for its liquidation by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years. But this did not complete the compact, for Congress had not yet given its consent, which was necessary under the Constitution of the United States.

Afterwards application was made by the proposed new State for admission to the Union under the Constitution containing the provisions above recited; and, on the 31st day of December, 1862, an act was passed by Congress providing for its admission upon certain conditions, none of which had any reference to the indebtedness of the old State (12 Stat., 633). This act of Congress recited that the "Legislature of Virginia, by an act passed on the 13th of May, 1862, did give its consent to a formation of a new State within the jurisdiction of the said State of Virginia, to be known by the name of West Virginia," etc., etc. The Virginia act of May 13, 1862, was passed while the application of West Virginia for admission into the Union was pending, and its first section provided that the consent of the legislature of Virginia is given to the formation and erection of the State of West Virginia within the jurisdiction of that State, to include certain counties which are mentioned in the act, "according to the boundaries and under the provisions set forth in the Consti-

tution for the said State of West Virginia and the schedule thereto annexed proposed by the convention which assembled at Wheeling on the 26th day of November, 1861."

It was further provided that—

"This act shall be transmitted by the executive to the senators and representatives of this Commonwealth in Congress, together with a certified original of the said constitution and schedule, and the said senators and representatives are hereby requested to use their endeavors to obtain the consent of Congress to the admission of the State of West Virginia into the Union."

See Constitution and Statutes of Virginia and West Virginia, 1861-66, page 3, Acts of Extra Session, May, 1862.

The schedule attached to the constitution of West Virginia and referred to in the act declared that "when the General Assembly of the State of Virginia and the Congress of the United States shall severally give their consent to the formation and erection of the State of West Virginia as proposed, the commissioners hereby appointed shall forthwith issue their proclamation," etc., etc.

Finally, on the 20th day of June, 1863, the State of West Virginia was admitted into the Union under the constitution framed by its convention, approved by the State of Virginia and the Congress of the United States. And thus the consent of that body was given to all the provisions of the agreement and it became a legal and constitutional compact between the two States.

Virginia v. West Virginia, 11 Wall., 39.

Green v. Biddle, 8 Wheat., 1-86.

Virginia v. Tennessee, 148 U. S., 503.

West Virginia having agreed to the proposed compact, upon the conditions that her own legislature should ascertain the amount of the debt and provide for its liquidation in a certain manner and the reconstructed State of Virginia having been authorized by Congress to elect delegates to frame a constitution, proceeded to do so, and in 1867 adopted a constitution, the 19th section of article 10 of which contained the following provision:

"The General Assembly shall provide by law for adjusting with the State of West Virginia the proportion of the public debt of Virginia proper to be borne by the States of Virginia and West Virginia, and shall provide that such sum

as shall be received from West Virginia shall be applied to the payment of the public debt of the State."

In 1902, after Virginia had settled with her creditors, a new constitution was adopted, which omitted this section and contained no provisions upon the subject of a settlement with West Virginia.

It appears plainly from the foregoing that essential parts of the compact as agreed to by West Virginia were that the legislature of that State should ascertain what was her just proportion of the debt; that it should provide for its liquidation by the establishment of a sinking fund; that the State of Virginia assented to this condition by consenting to the admission of the new State "under the provisions set forth in the constitution of the said State of West Virginia and the schedule thereto annexed," and that Congress admitted the State under that Constitution, thereby consenting to the compact with the conditions constituting part of it.

The two States have therefore, by compact between themselves, and with the consent of Congress, as required by the Constitution, designated a tribunal to ascertain and settle West Virginia's share of the debt. This tribunal still exists and is unquestionably competent to discharge the duties imposed upon it. And, moreover, but most important of all, it is the only tribunal existing or that can be established, possessing the power to provide for the payment of West Virginia's share of the debt when the same has been ascertained in accordance with the terms of the compact. It cannot be coerced by any judicial or other civil process known to the Constitution or laws of this country. No court can compel it either to adjust the debt or to provide a sinking fund, or impose taxes, issue bonds, or appropriate money.

Conceding, for the sake of the argument, that Virginia might maintain a suit in this court as trustee, the question must be considered whether the bill states a good cause, or good causes, of action in favor of the plaintiff, either in her own right or as trustee for the parties. Clearly there is no cause of action shown against West Virginia under the provisions of the act of February 4, 1863, which is embodied in the bill (R., p. 4). The first section of that act appropriates \$150,000 to the State of West Virginia when it shall be organized and admitted into the Union; but it does not provide that the new State shall account for it in any way. Whether the whole of the sum appropriated, or, if not the whole, what part of it, had been paid into the treasury by the counties located within the boundaries of the proposed new State does not appear from the act, and is not

alleged in the bill. As there was no provision that it should be accounted for or repaid to Virginia, the presumption is, especially in the absence of an allegation upon that subject, that it was in fact collected from the West Virginia counties, or that it was intended as a gratuity to the new State. The bill being silent upon the subject and every presumption being against the pleader in such a case, the court cannot infer a cause of action in favor of the plaintiff. The second section of the act shows plainly on its face that it appropriated no money except what had been actually collected from the counties within the proposed boundaries of the new State, and as it was not required to account, and never agreed to account, no cause of action, legal or equitable, can be based on that part of the statute.

The other act under which a claim is made in this action was passed February 3, 1863 (R., p. 4). In brief, the first section of that act transfers to West Virginia certain public property "within the boundaries of the proposed new State of West Virginia when she becomes one of the United States," and declares that the title shall pass without any other assignment, conveyance, transfer or delivery than is therein contained. The second section provides that if the appropriation of the property, stocks, and securities made by the act shall take effect, the State of West Virginia "shall duly account for the same in the settlement hereafter to be made with this State." The bill alleges that the plaintiff "is informed, believes, and so charges" that the property transferred under this act consisted of a number of items, and that its value amounted to "several millions of dollars," but that the plaintiff is "unable to state at this time the exact amount." It is then alleged that the State of West Virginia realized from the bank stocks alone "about six hundred thousand dollars;" but there is no allegation as to their value at the time of the transfer.

It is evident that the "settlement hereafter to be made with this State" means a settlement of West Virginia's just proportion of the old public debt which had been provided for by the ordinance of the Wheeling convention and by the constitution of West Virginia, which was then before Congress on her application for admission into the Union. In the adjustment provided for in the compact West Virginia was to be charged with "all the State expenditures within the limits thereof," since any part of the debt was contracted, and consequently the State of Virginia, in order that it might not thereafter be claimed that the expenditures on account of the

public property transferred by the act of February 3, 1863, were not to be included in the settlement under the compact, expressly provided that they should be. The bill therefore shows an attempt to make two causes of action out of one—a separate cause of action based upon the compact for the recovery of the amount of money originally expended by the State of Virginia in paying for the property so transferred, and another cause of action founded on the statute. The State of Virginia of course retained all the public property situated within her own boundaries after the separation, and it was the intention of Virginia that West Virginia should become the owner of all within her limits and should, in the settlement made under the compact, account to the old State for the expenditures made by that State in procuring it.

We think enough will be said, and suggested, in other parts of this argument to establish the proposition that the State of Virginia has not alleged, and cannot allege, either in her own right, or as trustee, a good cause of action against the defendant State on the compact. Before she could possibly sue the defendant State, either at law or in equity, to recover for contribution, she must have paid the whole debt, or at least she must have paid more than her own legal or equitable share of it. As the case is now presented, neither Virginia nor her creditors have been injured in the slightest degree by the fact that West Virginia has not paid her proportion of the debt. Virginia has not been injured, because she has herself paid, or extended, only that part of the debt which, according to her own judgment, she would have been justly required to pay if West Virginia had fully complied with her alleged obligations, and she has been released from all the remainder; and the creditors have not been injured by any alleged default on the part of West Virginia, because they never had any claim, legal or equitable, against her and have voluntarily discharged their only debtor from liability. It is elementary law that if one owes a debt and another agrees with him—not with the creditor—that he will furnish a part of the money to pay it, or that he will reimburse the debtor as to a part of it, the original debtor cannot sue for contribution until he has paid the debt, and certainly not until he has paid his own share and some part of what the other agreed to furnish or reimburse; and in the latter case he could sue only for what he had paid in excess of his own share. The applicability of this legal and equitable rule is the same whether the liability to contribute is founded on an express

contract between the parties or is implied, as in the case of cosureties.

It is not alleged in the bill that the State of Virginia has ever made an account or statement of her claim under the compact and presented it for payment or adjustment. On the contrary, it is shown by the bill and exhibits that as early as 1871, if not before that date, Virginia repudiated the compact and arbitrarily decided that West Virginia was liable for one-third of the debt, and has always, at least up to the time of the institution of this suit, insisted upon an adjustment on that basis only. This is shown by the preambles and provisions of every act passed providing for an adjustment with her creditors; and in the joint resolution of March 6, 1894, creating a commission to settle with West Virginia, it was declared:

“But such commission shall in no event enter into negotiations hereunder except upon the basis that Virginia is bound only for the two-thirds of the debt of the original State which she has already provided for as her equitable proportion thereof.”

(R., p. 40.)

This restriction upon the power of the commission has never been repealed, and that body has now no power to negotiate with the defendant State upon any other basis. It is a mockery, however, to characterize such a proceeding as a “negotiation.” An ultimatum was presented at the very beginning, and West Virginia was distinctly informed that she must recognize her liability to pay one-third of the debt, or have no adjustment. Under this proposition no accounts were to be presented or examined, no vouchers or other documents were to be considered, except such as would show the amount of the debt prior to January 1, 1861; the terms of the compact were to be wholly ignored and nothing was to be done except to divide the amount of the debt by three. West Virginia was perfectly justifiable in declining to “negotiate” upon such a basis as this.

If the allegations contained in paragraphs fifteen and sixteen of the bill (R., p. 9) are to be regarded by the court as setting up a cause of action for West Virginia's equitable proportion of the debt, the plaintiff is claiming in this case a double liability upon the part of that State—a liability for her equitable proportion, or for one-third, of \$33,000,000, the alleged amount of the whole public debt on the 1st of January, 1861, and also a liability for her equitable proportion, or one-third, of the \$25,000,000 alleged to have been paid

by Virginia, which is a part of the \$33,000,000. We do not think, however, that the court can regard the general and indefinite allegations in the paragraphs to which we have referred as even a serious attempt to state a cause of action; but if it is, then the bill contains three separate claims instead of two.

But it is clear that Virginia could not under the ordinance, or upon any principle of law or equity, have a cause of action against West Virginia for contribution to the payment of her (Virginia's) own equitable share of the debt, either before or after she had paid it; nor can that State recover against West Virginia any part of the old debt from which she has been released and discharged by her creditors.

We have endeavored to show that if Virginia, either in her own right or as trustee, ever had a cause of action against West Virginia on account of the old debt, it was founded on the compact, and the sum she had a right to demand was to be ascertained and paid in the manner prescribed in the compact; but that State and her creditors have, without consulting West Virginia, created a situation which renders it impossible for this court, or any other tribunal, now to adjust the liability of the latter State in the manner therein prescribed without doing great injustice to her. An examination of the Wheeling ordinance shows that the amount of the Virginia debt as it existed prior to January 1, 1861, is not a factor to be taken into consideration in ascertaining West Virginia's just proportion. It is alleged in the bill that the debt at the time of the separation amounted to "about \$33,000,000." When Virginia passed the ordinance, and when West Virginia accepted it with the modifications as to the manner of ascertaining and paying the debt, both parties knew what the amount of the indebtedness was; and it was agreed between them that if West Virginia was charged "with all the State expenditures within her limits and a just proportion of the ordinary expenses of the State since any part of the debt was contracted, and credited with the moneys paid into the treasury of the Commonwealth from the counties included within the proposed new State during the same period," the result would show what was her just portion of the debt; that is, her just proportion of \$33,000,000. If Virginia had repudiated the entire debt, or had admitted her liability for only \$5,000,000, or for any other sum less than the \$33,000,000, and her creditors had settled upon such a basis, it could scarcely be seriously contended that West Virginia would still be liable to her for exactly the same amount as if she had paid, or adjusted, the

whole \$33,000,000; and yet that will necessarily be the result if the mode of settlement provided for in the compact is applied to a situation which Virginia and her creditors have now created. The State of Virginia has not paid the debt, but has extended two-thirds of it, which she decided for herself was her equitable share, and has been released from all the remainder; but she now asks that West Virginia may be compelled to pay to her in her own right, or as trustee, the same amount precisely as if the whole debt had been paid or settled by the issue of new bonds.

It is important to bear in mind throughout the consideration of this case that West Virginia's obligation to pay a just proportion of the debt was to Virginia alone, not to the bondholders. As to the bondholders, Virginia was legally the sole obligor and has always remained so. Neither changes in her constitution of government nor in her territorial area could affect in any degree her liability under her previous obligations. Notwithstanding such changes in either of these respects, the State continued to be the same political entity which incurred the obligation, and the compact by which West Virginia agreed to pay her just proportion of the obligations was made between the two States alone, not between them and the bondholders, and the settlement was to be made between the two States. We doubt whether, in the absence of a compact on the subject, the State of West Virginia would have been legally liable to pay any part of it to Virginia, or to reimburse the parent State on account of any part of it; but as there was a compact, the discussion of these propositions would be purely academic in this case.

If the court has any power to render and enforce a judgment or decree in this cause which would afford to the plaintiffs effective and final relief, it must be a judgment or decree for a definite sum of money found to be due to the State of Virginia on a settlement made in the mode provided by the compact, or else the solemn compact entered into with the consent of Congress, thereby becoming, as this court said in *State of Pennsylvania v. Wheeling Bridge Co.*, 13 How., 185, "a law of the Union," must be wholly disregarded and the amount of the judgment or decree must be ascertained according to some other rule or principle, adopted by the court, to which the parties refused to assent when the compact was made. The adoption of the latter method is not even supposable, for the compact is either valid or invalid; and if it is valid, it cannot be disregarded by the court, while if it is invalid the consequence would

be that West Virginia was unconstitutionally admitted and is not now a State of the Union, and therefore cannot be sued as such.

In *Green v. Biddle*, 8 Wheat., 1-85, 86, this court said:

"Now, it is perfectly clear that although Congress might have refused their consent to the proposed separation, yet they had no authority to declare Kentucky a separate and independent State without the assent of Virginia *or upon terms Variant from those which Virginia* had prescribed. But Congress, after recognizing the conditions upon which alone Virginia agreed to the separation, expressed by a solemn act the consent of that body to the separation. The terms and conditions, then on which alone the separation could take place, or the act of Congress become a valid one, were necessarily assented to; not by a mere tacit acquiescence, but by an express declaration of the legislative mind, resulting from the manifest construction of the act itself. To deny this is to deny the validity of the act of Congress, without which Kentucky could not have become an independent State; and then it would follow that she is at this moment a part of the State of Virginia, and all her laws are acts of usurpation. The counsel who urged this argument would not, we are persuaded, consent to this conclusion; and yet it would seem to be inevitable, if the premises insisted upon be true."

In *State of Penna. v. The Wheeling Bridge Co.*, 13 How., 518, 566, the court, speaking of this same compact, declared (p. 566):

"This compact, by the sanction of Congress, has become a law of the Union," citing *Green v. Biddle*, *supra*.

In the case of *Poole v. Flegler*, 11 Pet., 185, 209, the court construed the compact between Kentucky and Tennessee, consented to by Congress, determining a matter of boundary, and it held that—

"The compact, then has full validity, and all the terms and conditions of it must be equally obligatory upon the citizens of both States."

If the court is to found its judgment or decree upon the compact, it must take the place of the legislature of West Virginia in the determination of the amount due, and then it must also disregard the terms of payment provided for in the constitution of that State, which is a part of the compact, or it must in some way establish a sinking fund sufficient to discharge the interest and principal of the

debt at the end of a series of years. It may be observed here that the sinking fund contemplated by the constitution of West Virginia was not intended to be, and in fact could not be, established until the amount of that State's proportion of the debt had been ascertained by the legislature, for until that had been done it was not possible to know what sum would be required to produce the necessary accumulation.

Leaving out of consideration the untenable proposition that the compact is to be disregarded and the adjustment made according to some rule or principle not recognized in it, the demand of the plaintiffs is, in substance and effect, that the court shall decree and enforce a specific performance of the compact, for if that is not the object of the suit, it presents only a moot question which the court will not decide. A mere declaration of the principles upon which an accounting shall be had and the taking of the account accordingly, to be followed by no enforceable judgment or decree, affords no relief and would therefore be an idle and useless proceeding. Besides, it is wholly unnecessary for the court to declare the principles upon which the adjustment shall be made; that is plainly done in the compact.

We have said that this court could not compel the legislature of West Virginia to levy a tax or appropriate money or issue bonds to provide for the payment of any judgment or decree which might be rendered in this case; and we may add that it could not even appoint a receiver or commissioner to collect a tax or to issue bonds for that purpose even if the tax had been imposed by the proper legislative authority, or the issue of bonds had been duly authorized.

The authorities upon this and analogous questions are numerous and conclusive. In *Rees v. City of Watertown* (19 Wall., 107), which was a suit in equity to enforce the collection of certain judgments upon the bonds of the city of Watertown, the court said:

"We are of the opinion that this court has not the power to direct a tax to be levied for the payment of these judgments. This power to impose burdens and raise money is the highest tribute of sovereignty, and is exercised, first, to raise money for public purposes only; second, by the power of legislative authority only. It is a power that has not been extended to the judiciary. Especially is it beyond the power of the Federal judiciary to assume the place of a State in the exercise of this authority at once so delicate and so important."

And after referring to the statute, the court said:

"But independently of this statute, upon the general principles of law and of equity jurisprudence, we are of opinion that we cannot grant the relief asked for. The plaintiff invokes the aid of the principle that all legal remedies having failed, the court of chancery must give him a remedy; that there is a wrong which cannot be righted elsewhere, and hence the right must be sustained in chancery. The difficulty arises from too broad an application of a general principle. The great advantage possessed by the court of chancery is not so much in its enlarged jurisdiction as in the extent and adaptability of its remedial powers. Generally this jurisdiction is as well defined and limited as is that of a court of law. It cannot exercise jurisdiction when there is an adequate and complete remedy at law. It cannot assume control over that large class of obligations called imperfect obligations, resting upon conscience and moral duty only, unconnected with legal obligations. Judge Story says: 'There are cases of fraud, of accident, and of trust which neither courts of law nor of equity presume to relieve or to mitigate,' of which he cites many instances. Lord Talbot says: 'There are cases, indeed, in which a court of equity gives a remedy where the law gives none, but where a particular remedy is given by law, and that remedy bounded and circumscribed by particular rules, it would be very improper for this court to take it up where the law leaves it, and extend it further than the law allows.' "

Again the court said:

"A court of equity cannot, by avowing that there is a wrong and no remedy known to the law, create a remedy in violation of law, or even without the authority of law. It acts upon established principles not only, but through established channels. Thus, assume that the plaintiff is entitled to the payment of his judgment, and that the defendant neglects its duty in refusing to raise the amount by taxation, it does not follow that this court may order the amount to be made from the private estate of one of its citizens."

Again the court said, in the course of its opinion:

"The want of a remedy and the inability to obtain the fruits of a remedy are quite distinct, and yet they are confounded in the present proceedings."

In *Heine v. The Levee Commissioners* (19 Wall., 655) the court said, speaking of the right to give a party the relief demanded:

"If sustained at all it must be on the very broad ground that because the plaintiff finds himself unable to collect his debt by proceedings at law, it is the duty of a court of equity to devise some mode by which it can be done. It is, however, the experience of every day and of all men, that debts are created which are never paid, though the creditor has exhausted all the resources of the law. It is a misfortune which in the imperfection of human nature often admits of no redress. The holder of a corporation bond must in common with other men submit to this calamity, and the law affords no relief.

"The power we are here asked to exercise is the very delicate one of taxation. This power belongs in this country to the legislative sovereignty, State or national. In the case before us the national sovereignty has nothing to do with it. The power must be derived from the legislature of the State. So far as the present case is concerned, the State has delegated the power to the levee commissioners. If that body has ceased to exist, the remedy is in the legislature either to assess the tax by special statute or to vest the power in some other tribunal. It certainly is not vested, as in the exercise of an original jurisdiction, in any federal court. It is unreasonable to suppose that the legislature would ever select a federal court for that purpose. It is not only not one of the inherent powers of the court to levy and collect taxes, but it is an evasion by the judiciary of the federal government of the legislative functions of the State government. It is a most extraordinary request, and a compliance with it would involve consequences no less out of the way of judicial procedure, the end of which no wisdom can foresee."

In *The State Railroad Tax Cases* (92 U. S., 575), speaking of the want of authority in judicial tribunals to interfere with the process of collecting taxes, the court said:

"It is a wise policy. It is founded in the simple policy derived from experience of ages that the payment of taxes has to be enforced by summary and stringent means against a reluctant and often adverse sentiment; and to do this successfully other instrumentalities and other modes of enforcing it are necessary than those which belong to courts of justice. See *Cheatham v. Norvell*, decided at this term; *Nickoll v. United States* (7 Wall., 122); *Dow v. Chicago* (11 Ill. 108)."

In *Merriweather v. Garrett* (102 U. S., 472), the court said on page 501:

"The power of taxation is legislative and cannot be exer-

cised otherwise than by the authority of the legislature. *

* * Taxes can only be collected under authority of the legislature. If no such authority exists the remedy is by appeal to the legislature which alone can grant relief."

And Mr. Justice Field, for himself and Mr. Justice Miller and Mr. Justice Bradley, in a concurring opinion, said, on page 515:

"The courts cannot continue in force the taxes levied, nor levy new taxes for the payment of the debts of the corporation. Levying taxes is not a judicial act. It has no elements of one. It is a high act of sovereignty, to be performed only by the legislature upon considerations of policy, necessity and the public welfare. In a distribution of the powers of government in this country into three departments, the power of taxation falls to the legislative. It belongs to that department to determine what measures shall be taken for the public welfare and to provide the revenues for the support and due administration of the government throughout the State in all its subdivisions. Having the sole power to authorize the taxation, it must equally possess the sole power to prescribe the means by which the tax shall be collected and to designate the officers through whom its will shall be enforced.

"It is the province of the courts to decide cases between parties and in so doing to construe the constitution and statutes of the United States and of the sovereign States and to declare the law, and when their judgments are rendered, to enforce them by such remedies as legislation has prescribed or as are allowed by the established practice. When they go beyond this, they go outside of their legitimate domain and encroach upon the other departments of the government, and all will admit that a strict confinement of each department within its own proper sphere was designed by the founders of the government, and is essential to its successful administration."

In *Heine v. The Levee Commissioners* (1 Wood, 247), in the United States circuit court, the opinion was delivered by Mr. Justice Bradley, and, speaking of taxation, he said:

"The judicial department has no power over the subject. If the officers who are charged with the duty of laying or collecting taxes refuse to perform their functions, the court, in a clear case of failure, and at the instance of a party directly interested, can, by the prerogative of the writ of mandamus, compel them to perform acts which are ministerial as distinguished from those which are judicial or discretionary. This is all that the judicial department can do on the subject

unless the legislation has expressly conferred upon it further powers."

Louisiana v. Jumel (107 U. S., 711) was a bondholders' bill against the State board of liquidation, alleging that the State had impaired the obligation of an express contract, and there was also a petition for a mandamus against the board and the State auditor and treasurer. The object of the proceedings was to compel the State officers to pay from the general funds of the State the repudiated bonds and coupons held by the complainants. The court said:

"In neither of the suits was any inquiry to be instituted in respect to the particular bonds and coupons held by the plaintiffs, or any special relief afforded as to them. All that is asked will inure as much to the benefit of the other holders of similar obligations as to the particular parties to these suits. So that the remedy sought implies power in the judiciary to compel the State to abide by and perform its contracts for the payment of money, not by rendering and enforcing a judgment in the ordinary form of judicial procedure, but by assuming the control of the administration of the fiscal affairs of the State to the extent that may be necessary to accomplish the end in view.

* * * * *

"In *United States v. Lee*, 106 U. S., 196, it was held that the officers of the United States, holding in their official capacity the possession of lands to which the United States had no title, could be required to surrender their possession to the rightful owner even though the United States were not a party to the judgment under which the eviction was to be had. Here, however, the money in question is lawfully the property of the State. It is in the manual possession of an officer of the State. The bondholders never owned it. The most they can claim is that the State ought to use it to pay their coupons, but until so used it is in no sense theirs.

"Little need be said with special reference to the suit for *mandamus*. In this no trust is involved; but the simple question presented is, whether a single bondholder, or a committee of bondholders, can, by the judicial writ of *mandamus*, compel the executive officers of the State to perform generally their several duties under the law. The relators do not occupy the position of creditors of the State demanding payment from an executive officer charged with the ministerial duty of taking the money from the public treasury and handing it over to them, and, on his refusal, seeking to compel him to perform that specific duty. What they ask is that the auditor of State, the treasurer of State, and the board of

liquidation may be required to enforce the act of 1874, and 'carry out, perform, and discharge each and every one of the ministerial acts, things, and duties respectively required of them, * * * according to the full and true intent and purport of that act.' Certainly no suit begun in the circuit court for such relief would be entertained, for that court can ordinarily grant a writ of mandamus only in aid of some existing jurisdiction. *Bath County v. Amy*, 13 Wall., 244; *Davenport v. County of Dodge*, 105 U. S., 237. Our attention has been called to no case in the courts of Louisiana in which such general relief has been afforded; and the jurisdiction of the circuit court was, therefore, in no way enlarged through the operation of the removal acts, even if this is a case which was properly removed,—a question we do not deem it necessary to now decide. The remedy sought, in order to be complete, would require the court to assume all the executive authority of the State, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection, and disbursement of the tax in question until the bonds, principal and interest, were paid in full, and that, too, in a proceeding in which the State, as a State, was not and could not be made a party. It needs no argument to show that the political power cannot thus be ousted of its jurisdiction and the judiciary set in its place. When a State submits itself, without reservation, to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the State has by its act of submission allowed to be done; and if the law permits coercion of the public officers to enforce any judgment that may be rendered, then such coercion may be employed for that purpose. But this is very far from authorizing the courts, when a State cannot be sued, to set up its jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power in their administration of the finances of the State. In our opinion, to grant the relief asked for in either of these cases would be to exercise such a power."

And in the case of *Thompson v. Allen County*, etc. (115 U. S., 550), the whole subject was again reviewed by this court, upon a certificate of division from the circuit court. Two of the questions certified were:

1. Whether taxes levied under judicial direction can be collected through a receiver appointed by the court of chancery, if there is no public officer with authority from the legislature to perform the duty.

2. Whether taxes levied by State officers under judicial direction can be collected through a receiver appointed by the United States court where the legislature has provided an officer to collect, but there is a vacancy in office and no one can be found willing to accept the office.

This court answered these questions in the negative. (See also the same case reported in 13 Fed. Rep., 97, Mr. Justice Matthews delivering the opinion.)

It is evident that a judgment or decree in this case must be for money only and must be enforced, if enforced at all, either by a sale of the State's property or by taking control of its legislative and executive authorities and compelling them, by some process not heretofore known to our jurisprudence, to appropriate money from the State treasury for the satisfaction of the debt, or to levy taxes or issue and sell bonds for that purpose. The question whether any of these remedies can be afforded must, it seems, be directly met and finally settled in the present case if there is any good cause of action shown; for, as before said, there is **no allegation** that there is a lien or trust or any other element involved in either of the alleged causes of action to require the application of any remedy except a judgment or decree for money.

The jurisdiction of this court in an action brought by one State against another to settle a question of boundary, or to secure redress for wrongs and injuries perpetrated by another State upon the territorial rights of the complaining State, or upon the rights of large communities of its people, has been definitely settled by a long series of cases, beginning with *Rhode Island v. Massachusetts* (12 Peters, 657) in one class, and ending with the other class in the two cases of *Kansas v. Colorado* (185 U. S., 125) and *Missouri v. Illinois* (180 U. S., 208, and 200 U. S., 496). But when this court decides a question of boundary between two States, or the boundary between a State and a Territory of the United States, no judicial process is necessary to carry its judgment or decree into effect. When the facts as to the true location of the line of separation has been found by the court, the political departments of the Government, as well as the courts of the States concerned, are bound to recognize its adjudication as conclusive of the question, and the territory formerly in dispute must be thereafter treated as part of the State to which it has been awarded. It will be included by the legislative department of the United States in the congressional and judicial districts of the State, and its people will be recognized as qualified electors in the choice of members of the

House of Representatives, and their representatives in the State legislature will be recognized as qualified electors in the choice of members of the United States Senate for that State. The executive department of the United States, in the exercise of its authority under the Constitution, in the execution of its powers concerning the constitutional and legal relations between the State and the general government, will also treat the territory as part of the State to which it has been adjudged to belong. No State which has lost part of its territory by such adjudication could, therefore, prevent the practical execution of the judgment or decree by legislation or otherwise; for every attempt to continue the exercise of its own jurisdiction over it would be defeated, not only by the political departments, but by the courts as well. So far as we have been able to ascertain, no judicial process has ever been issued or applied for to carry such judgments or decrees into effect, except an order directing the established line to be surveyed and properly marked.

In the other class of cases, where trespasses or nuisances are complained of, and where the acts complained of are done by or under the authority of the defendant State, a decree of this court enjoining the continuance of the wrongs would be binding upon all the officers and agencies of the State, and upon all other persons who might thereafter knowingly participate in the violation of the decree, and they would all be punished for contempt. A power to make and enforce a decree in such a case is very different from the power to make and enforce a decree requiring the legislative or executive authorities of the State to take affirmative action in regard to matters which their own constitution and laws, and the plan and theory of our dual system of government, have committed to their own exclusive judgment and discretion.

There is no fact alleged that would authorize a court of equity to take jurisdiction for the enforcement of such claims as are set up in this case. But, waiving that subject for the present, we propose to confine ourselves in this part of the argument to the question whether this court, under that provision of the constitution which confers upon it jurisdiction over cases in which a State shall be a party, has the power, either in equity or at law, to hear and determine a case in which the final relief demanded is the rendition and enforcement of a simple judgment for money against a State. In *United States v. North Carolina*, 136 U.S., 127, which is one of the cases relied upon to show the jurisdiction of this court in an action against a State for the recovery of money, not only was there no objection made to the jurisdiction at any stage of the proceedings,

but the whole case, which involved no question of fact and only a single question of law, was, by the written consent of the parties, submitted to the court for its decision. It has been decided by this court that a State may waive its privilege and submit itself to the jurisdiction of any court at the suit of another State, or at the suit of an individual.

Beers v. Arkansas, 20 How., 527.

Clark v. Bernhard, 108 U. S., 115.

In the case last cited the court said:

“The immunity from suit belonging to a State which is respected and protected by the Constitution within the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure; so that a suit otherwise well brought, in which a State had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction while of course those courts are always open to it as a suitor in controversies between it and citizens of other States.”

We do not think, therefore, that the case relied upon can be properly considered as a conclusive adjudication that this court has jurisdiction of an action against a State for the recovery of a money judgment when the State has not consented to be sued but is protesting. Besides, the court, after considering the question submitted by consent of the parties, found that nothing was due from the State and therefore was not required to render a judgment against it. What it would have done if it had found against the State, whether it would have decided that it had power to render and enforce a judgment for the payment of the money, cannot, of course, be known; but from what was subsequently said and done in the case of *South Dakota v. North Carolina*, 193 U. S., 286, we are at liberty to say that the question of power in the court to render and enforce such a judgment is at least still open.

In the case last referred to the court said:

“But we are confronted with the contention that there is no power in this court to enforce such a judgment, and such lack of power is conclusive evidence that, notwithstanding the general language of the constitution, there is an implied exception of actions brought to recover money. The public property held by any municipality, city, county or State, is

exempt from seizure upon execution because it is held by such corporation, not as a part of its private assets, but as a trustee for public purposes *Meriwether v. Garrett*, 102 U. S., 472, 513. As a rule no such municipality has any private property subject to be taken upon execution. A levy of taxes is not within the scope of the judicial power except as it commands an inferior municipality to execute the power granted by the legislature."

The court then refers to the cases of *Rees v. City of Watertown* (19 Wall., 107) and *Heine v. The Levee Commissioners* (19 Wall., 655) and says:

"In this connection reference may be made to *United States v. Guthrie*, 17 How. 284, in which an application was made for a mandamus against the Secretary of the Treasury to compel the payment of an official salary, and in which we said (p. 303):

"The only legitimate inquiry for our determination upon the case before us is this: Whether, under the organization of the federal government, or by any known principle of law, there can be asserted a power in the Circuit Court of the United States for the District of Columbia, or in this court, to command the withdrawal of a sum or sums of money from the Treasury of the United States, to be applied in satisfaction of disputed or controverted claims against the United States? This is a question, the very question presented for our determination; and its simple statement would seem to carry with it the most startling considerations—nay, its unavoidable negation, unless this should be prevented by some positive and controlling command; for it would occur, *a priori*, to every mind, that a treasury, not fenced round or shielded by fixed and established modes and rules of administration, but which could be subjected to any number or description of demands, asserted and sustained through the undefined and undefinable discretion of the courts, would constitute a feeble and inadequate provision for the great and inevitable necessities of the nation. The government under such a *regime*, or, rather, under such an absence of all rule, would, if practicable at all, be administered, not by the great departments ordained by the constitution and laws, and guided by the modes therein prescribed, but by the uncertain and perhaps contradictory action of the courts, in the enforcement of their views of private interests."

"Further, in this connection may be noticed *Gordon v. United States*, 117 U. S., 697, in which this court declined to take jurisdiction of an appeal from the Court of Claims, under the statute as it stood at the time of the decision, on the ground that there was not vested by the act of Congress pow-

er to enforce its judgment. We quote the following from the opinion, which was the last prepared by Chief Justice Taney (pp. 702, 704) :

"The award of execution is a part, and an essential part, of every judgment passed by a court exercising judicial power. It is no judgment, in the legal sense of the term, without it. Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy. * * Indeed, no principle of constitutional law has been more firmly established or constantly adhered to, than the one above stated—that is, that this court has no jurisdiction in any case where it cannot render judgment in the legal sense of the term; and when it depends upon the legislature to carry its opinion into effect or not, at the pleasure of Congress."

The court also cited *In re Sanborn*, 148 U. S., 222, and *La Abra Silver Mining Company v. United States*, 175 U. S., 423, 456, and proceeded to say:

"We have, then, on the one hand the general language of the constitution vesting jurisdiction in this court over 'controversies between two or more States,' the history of that jurisdictional clause in the convention, the cases of *Chis olm v. Georgia*, *United States v. North Carolina*, and *United States v. Michigan* (in which this court sustained jurisdiction over actions to recover money from a State), the manifest trend of other decisions, the necessity of some way of ending controversies between States, and the fact that this claim for the payment of money is one justiciable in its nature; on the other, certain expressions of individual opinions of justices of this court, the difficulty of enforcing a judgment for money against a State, by reason of its ordinary lack of private property subject to seizure upon execution, and the absolute inability of a court to compel a levy of taxes by the legislature. Notwithstanding the embarrassments which surround the question, it is directly presented and may have to be determined before the case is finally concluded, but for the present it is sufficient to state the question with its difficulties."

The decision of the question never became necessary, for the reason that the parties afterwards settled the matter between themselves, so that all the court actually did in that case was to enforce a lien.

In *United States v. Michigan*, 190 U. S., 379, the opinion of the court was delivered upon a demurrer which, of course, admitted all

the material allegations of the bill, and the court decided that the State of Michigan held certain funds and certain tools and machinery appertaining to the Saint Mary's River canal in trust for the United States, and that on the face of the bill the United States had a right to demand an accounting and a payment of the sum found due.

In the opinion it was said:

"In the consideration of this case, the controlling thought must of course be to arrive at the meaning of the parties, as expressed in the various statutes set forth in the bill. While that meaning is to be sought from the language used, yet its construction need not be of a narrow or technical nature, but in view of the character of the subject, the language should have its ordinary and usual meaning.

"Whether, under these circumstances, technical words were used to express the thought that the State was to be trustee, is not important if, upon a reading of the statutes and a survey of the condition of the country when the acts were passed, it is apparent that the intent was that the State should occupy the position of trustee in the construction and operation of the canal. *Winona &c. R. R. Co. v. Barney*, 113 U. S., 618, 625."

And after an examination of the question the court held that the State was a trustee for the United States as to the money and property in its possession, and it overruled the demurrer and gave the defendant leave to answer.

In *Kentucky v. Dennison*, 24 Howard, 66, where a law had been constitutionally enacted by Congress making it the duty of the governor of a State to surrender fugitives from the justice of other States, the court held that the suit was against the State, although the governor was the only party made defendant on the record, and in the course of the opinion it said:

"But the language of the act of 1793 is very different. It does not purport to give authority to the State executive to arrest and deliver the fugitive, but requires it to be done, and the language of the law implies an absolute obligation which the State authority is bound to perform. And when it speaks of the duty of the governor, it evidently points to the duty imposed by the constitution in the clause we are now considering. The performance of this duty, however, is left to depend on the fidelity of the State executive to the compact entered into with the other States when it adopted the Constitution of the United States and became a member of

the Union. It was so left by the constitution, and necessarily so left by the act of 1793.

"And it would seem that when the constitution was framed, and when this law was passed, it was confidently believed that a sense of justice and of mutual interest would insure a faithful execution of this constitutional provision by the executive of every State, for every State had an equal interest in the execution of a compact absolutely essential to their peace and well being in their internal concerns, as well as members of the Union. Hence, the use of the words ordinarily employed when an undoubted obligation is required to be performed, 'it shall be his duty.'

"But if the governor of Ohio refuses to discharge this duty, there is no power delegated to the general government, either through the judicial department of any other department, to use any coercive means to compel him" (pp. 109, 110).

In *Missouri v. Illinois*, 200 U. S., 496. in which no judgment or decree for money was demanded, the court said:

"In the case at bar, whether Congress could act or not, there is no suggestion that it has forbidden the action of Illinois. The only ground on which that State's conduct can be called in question is one which must be implied from the words of the constitution. The constitution extends the judicial power of the United States to controversies between two or more States and between a State and citizen of another State, and gives this court original jurisdiction in cases in which a State shall be a party. Therefore, if one State raises a controversy with another, this court must determine whether there is any principle of law, and, if so, what, on which the plaintiff can recover. But the fact that this court must decide does not mean, of course, that it takes the place of a legislature. Some principle it must have power to declare. For instance, when a dispute arises about boundaries, this court must determine the line and in so doing must be governed by rules explicitly or implicitly recognized (*Rhode Island v. Massachusetts*, 12 Pet., 657-733). It must follow and apply those rules even if legislation of one or both of the States seem to stand in the way. But the words of the constitution would be a narrow ground upon which to construct and apply to the relations between States the same system and municipal law in all its details which would apply between individuals. If we suppose a case which did not fall in the power of Congress to regulate, the result of a denial of rights by this court would be the establishment of a rule which would be irrevocable by any power except that of this court to reverse its own decision, an amendment of the con-

stitution, or possibly an agreement between the States sanctioned by the legislature of the United States.

"The difficulties in the way of establishing such a system of law might not be insuperable, but they would be great and new."

In every case since the adoption of the eleventh amendment to the Constitution where the court has found that the effect of granting the relief sought by the plaintiff would be to enforce the claim of an individual, whatever may be its nature, against a State, it has denied its power, or the power of any other court of the United States, to do so. It can make no difference what means or devices the parties may have resorted to for the purpose of getting the case into the court, if it appears that the real object of the action and the effect of the judgment or decree would be to conclude the State itself, and not merely its ministerial officers or agents, the court has refused to exercise jurisdiction for that purpose.

See *Hollingsworth v. Virginia*, 3 Dall., 378; *Osborn v. Bank*, 9 Wheat., 738; *Briscoe v. Bank*, 11 Pet., 257; *Jumel v. Louisiana*, 107 U. S., 710; *N. H. v. Louisiana*, 108 U. S., 726; *Poindexter v. Greenhow*, 114 U. S., 270; *Marye v. Parsons*, 114 U. S., 325; *Hagood v. Southern*, 117 U. S., 52; *In re Ayres*, 123 U. S., 443; *Christian v. Atlantic & N. C. R. R. Co.*, 133 U. S., 233; *Louisiana, etc., v. Steele*, 134 U. S., 230; *Penoyer v. McConnaughy*, 140 U. S., 1; *In re Tyler*, 149 U. S., 164; *Reagan v. Farmers' Loan and Trust Co.*, 144 U. S., 362; *Scott v. Donald*, 165 U. S., 58; *Tindel v. Wesley*, 167 U. S., 204; *Smith v. Ames*, 169, U. S., 466; *Fitz v. McGhee*, 172 U. S., 516.

This being the law, it is not possible to see how the State of Virginia can maintain an original action as trustee in this court for the avowed use and benefit of individuals on claims in which she as a State has no interest. To sustain such a proceeding would be a palpable evasion of the eleventh amendment, and would establish a precedent which would practically nullify that provision of the organic law by conferring original jurisdiction upon the court in every case where an individual might choose to transfer his real property or his goods and chattels, or choses in action, to a State as trustee, even if it were done, as in this case, for the sole purpose of conferring jurisdiction on this court. Certainly it cannot be held that a controversy between two States, justiciable in this court, can

be created by the transfer of a claim on behalf of an individual to one of the States as a mere trustee to sue and collect it, whatever may be the law in a case where the complaining State is itself the real and beneficial owner of the claim sued on. But this precise question was presented in the case of *Kansas v. United States*, decided February 25, 1907, and not yet reported, and the court disposed of it in a single sentence. After finding that the State was suing as trustee for the Missouri, Kansas and Texas Railway Company, the court said:

"In these circumstances we think it apparent that the name of the State is being used simply for the prosecution in this court of a claim of the railroad, and our original jurisdiction can not be maintained;" and the court held that as the United States has not consented to be sued the bill must be dismissed.

We cannot see how the provision of the Constitution which confers upon this court jurisdiction in cases in which a State shall be a party can be properly so construed and applied as to destroy, or disarrange, the distribution of powers between the federal government and the States, which that instrument establishes. To hold that the judicial tribunals of the United States, whether the case be in equity or at law, can seize and sell the property of a State or direct money to be paid out of its treasury, or assume control over its legislative and executive departments and decree when and how, and for what purpose, they shall exercise their constitutional authority, would be destructive of the independence of the several States in the management and control of their own internal affairs. Yet it is indisputable that if such tribunals possess the power to render valid judgments and decrees in such cases, they must be enforced by some one of the means we have stated.

Some other interpretation must therefore be given to the constitutional provision, some interpretation which will be consistent with the character of our political institutions and at the same time invest this court with original jurisdiction to hear and determine all controversies between States which affect their rights as States—that is, as political organizations clothed with the authority and charged with the duties of government. It is the duty of a State as such to preserve and protect its territorial area against the encroachments of another State; to see that the lives, health, and safety of its citizens are not impaired or endangered by the action of another State or by its authority; and when controversies arise concerning these matters, or others of like character, this court has original jurisdiction to hear and determine them. There is, in fact,

no other way to settle them except by negotiations or war, and the latter is prohibited by the constitution. To confine the jurisdiction to controversies of the character indicated and decline its exercise in cases where the enforcement of a judgment or decree would destroy or impair the sovereign authority⁷ of the States, would establish a reasonable construction of the constitution and accomplish all its real beneficial purposes.

There are many controversies between individuals which no judicial tribunal can take cognizance of, notwithstanding the comprehensive terms in which their jurisdiction is conferred, many rights which cannot be enforced, and many wrongs which cannot be redressed by the courts. Although they were established for the purpose of administering justice, it often happens that they are incapable of doing so by reason of the character of the questions involved or the character of the remedies required.

It is safe to say that if the framers of the constitution had expressly provided that this, or any other tribunal of the United States, should have power to seize and sell the property of a State or control the legislative and executive authorities of a State in any matter concerning its financial or other internal affairs, their work would have been rejected, and we do not think such an extraordinary power should be now applied from the general grant of original jurisdiction to this court in cases where a State is a party.

While it appears from the quotations made from the opinion of *South Dakota v. North Carolina* that in the judgment of this court the question as to its jurisdiction to render and enforce a judgment or decree against a State in a suit on a contract for the payment of money, where no lien or trust exist, is still an open one, yet, in view of the facts that it has been elaborately discussed at the bar and much considered by the court in previous cases, we do not propose in this brief to repeat the arguments or cite further authorities. Some questions have been, we think, definitely settled by former adjudications. They are:

1. That the public property of a State cannot be seized and sold to satisfy a judgment or decree.

2. That a court has power in a case properly made to compel the municipal authorities or ministerial officers of a State to comply with the laws of the State in the matter of imposing and collecting taxes.

3. That no court can appoint a receiver, commissioner, or other official with power to collect taxes and apply the proceeds to the satisfaction of a judgment or decree, even after they have been imposed by the proper authorities of the State.

4. That no court can by its judgment or decree order the payment of money out of the State or national treasury when it has not been appropriated by the proper legislative authority.

5. That no court can compel the legislature or executive authorities of a State to impose a tax or issue bonds or appropriate money for any purpose, or to exercise any other authority vested in them by the constitution of the State. Unless the numerous cases establishing these propositions shall be overruled in whole or in part, or unless the present case can be in some way distinguished from them, it is plain that no enforceable judgment or decree can be rendered by the court on any one of the alleged causes of action; and if that is so, it has, according to all the authorities on the subject, no jurisdiction to hear and determine the controversy.

We confidently submit that the outline of the bill heretofore given and the exhibits made part of it shows conclusively that it is multifarious, and that the demurrer ought to be sustained on that ground, if any good cause of action is shown over which this court has jurisdiction.

Virginia suing in her own right upon a separate and independent cause of action alleged to belong exclusively to her is not the same party as Virginia suing as trustee upon a different cause of action for the use and benefit of others who have no interest in her claim. Moreover, the State could not sue in equity in her own right, in one bill, upon two causes of action so entirely separate and distinct from each other as the claim for money and property alleged to have been delivered to the defendant under the acts of the legislature, and the claim founded upon the compact for the defendant's just proportion of the old public debt, even if she had paid that debt and was entitled to contribution. The foundations of the two causes of action are wholly different, and they are of a wholly different nature and require different judgments or decrees. They involve different questions of law and fact, and a defense which would be good against one would be wholly inapplicable to the other.

"Multifariousness," says Foster, "consists in the joinder of two or more distinct and unconnected grounds for equitable relief each

of which might be the foundation for a separate bill. This may occur in three ways—by misjoinder of plaintiffs, by misjoinder of defendants, and by misjoinder of grounds for equitable relief held by and against the same parties.”

Foster, Fed. Prac., sec. 71; *Calvert on Parties, Book I*, ch. VII.

Story says:

“By multifariousness in a bill is meant the improperly joining in one bill distinct and independent matters, and thereby confounding them; as, for example, the uniting in one bill of several matters perfectly distinct and unconnected, against one defendant, or the demand of several of a distinct and independent nature against several defendants in the same bill.”

Story's Equity Pl., sec. 271.

Again it is stated by Story:

“The result of the principles to be extracted from the cases on this subject seems to be that where there is a common liability and a common interest, a common liability in the defendants, and a common interest in the plaintiffs, different claims to property, at least if the subjects are such as may without inconvenience be joined, may be united in one and the same suit” (sec. 533).

In Daniel's Chancery Practice, page 335, it is said:

“It may be that the plaintiffs and defendants are parties to the whole of the transactions which forms the subject of the suit and nevertheless those transactions may be so dissimilar that the court will not allow them to be joined together, but will require distinct records.”

In *Brown v. Guarantee Trust Co.* (128 U. S., 404) this court said:

“To support the objection of multifariousness because the bill contains different causes of suit against the same person, two things must occur: First, the ground of suit must be different; second, each ground must be sufficient as stated to sustain a bill. *Bedsole v. Monroe* (5 Iredell Eq., 313); *Larkins v. Biddle*, (21 Ala., 252); *Nail v. Mobley* (9 Ga., 278); *Robinson v. Cross* (22 Conn., 171).”

See also *Shields v. Thomas*, 59 U. S., 253 (18 How.).

In *Walker v. Powers* (104 U. S., 245), a case analogous to the present, there was a misjoinder of plaintiffs and a misjoinder of causes of action. The opinion was delivered by Mr. Justice Miller, and the cases of *Emals v. Emals* (14 McArthur [N. J. Eq.] 114) and *Sawyer v. Noble* (55 Me., 273) were cited and approved.

See also *Dial v. Reynolds* (96 U. S., 340).

Doggett, etc., v. Florida R. R. Co. (99 U. S., 72).

In *Salvidge v. Hyde* (Jac., 151; Mad., 158) the Vice-Chancellor said:

“In order to determine whether a suit is multifarious, or, in other words, contains distinct matter, the inquiry is not, as this defendant supposes, whether each defendant is connected with every branch of the case, but whether the plaintiff's bill seeks relief in respect of matters which are, in their nature, separate and distinct.”

In *Church v. Citizens' Street Railway Company*, 78 Fed., 529, the court said:

“Multifariousness consists in stating against the same party two or more independent causes of action in the same bill; or it may consist in stating one or more causes of action against a portion of the defendants and another cause of action against another portion of the defendants.”

In that action the plaintiffs, who had purchased stock in a corporation, attempted to secure relief for themselves in their own right on one cause of action, and also to secure relief against the same defendants for themselves and all other stockholders on another cause of action. The court held the bill multifarious.

C. Zeigler v. Lake City Elevated Railroad Company, 76 Fed., 662; the *First National Bank v. Sioux City*, 75 Fed., 154; *Price, receiver, etc., v. Coleman*, 21 Fed., 557; opinion by J. Grey; *Central Bank v. Fitzgerald et al.*, 94 Fed., 16; *Lewarne v. Mexican Internal Improvement Co.*, 38 Fed., 629; *Actna Insurance Co. v. Smith*, 73 Fed., 318.

In *Metropolitan Trust Co. v. Columbus & Hocking Ry. Co.*, 93 Fed., 689, Judge Taft said:

“It is also true that a cause of action in favor of one in his own right is as distinct from a cause of action in favor of the same person as trustee as it is from that of a different

person. And therefore that a defendant against whom a trustee attempted to unite in the same bill with a cause of action asserted by him as trustee a wholly distinct cause of action in his individual right might object on the ground of multifariousness. In the case before us the defendant railway company might therefore be heard to urge this defect in the bill, because it asks for an enforcement of two different liens held in different rights."

But the court held that the objection to the bill for multifariousness could not be taken by Zohorst and the Second National Bank, "for," said the court, "as to that issue made by the complainant as trustee the right is the same." And again the court said:

"Upon that issue the complainant as trustee and in its own right has precisely the same interest. And the union of the two causes of action does not embarrass Zohorst or the bank in the slightest; for as to them, the causes of action raised but one narrow question" (page 691).

The difference between that case and the case at bar is obvious at a glance. In the case at bar the bill alleges two entirely separate and distinct causes of action arising out of two unconnected transactions, in one of which it alleges an interest in the plaintiff State, and in the other an interest as trustee, and thus presents two distinct series of issues to be investigated and decided. And, besides, it is perfectly clear that the State of Virginia has not the same interest in the cause of action alleged in her own right and in the one asserted as trustee; nor can the State of West Virginia make the same defense to both.

In *Moss v. Cohen*, 158 N. Y., 240, the plaintiff entitled the action as by himself individually and as executor, but there was only one cause of action alleged, and that was wholly for the benefit of the estate he represented. The court said:

"There is no pretense or allegation that the plaintiff claimed more than a single right of recovery and that he brought to enforce as executor and for the benefit of the estate he represents";

and it held that there was consequently no improper joinder of parties.

In *Hall v. Fisher*, 20 Bard. (N. Y.), the plaintiff sued in its own name and also as administrator, alleging that he and his intestate during the lifetime of the latter tenants in common, the intestate

owning three-fourths and the plaintiff owning one-fourth of a lot of land; and his claim was that the defendants should account to him individually and to him as administrator for their shares of rents and profits. The court held that the cause of action should have been separately stated. It said:

“How else can the defendant, if he has a defense of a different character as to each cotenant, avail himself of such defense? He might in this case have one defense against the plaintiff as to his personal claim and another defense as to the interest whose rights he claims to represent as administrator. It cannot be regular for a plaintiff to include in the same action claims in his individual right and as administrator of another. It was never allowed at common law and is not sanctioned or allowed by any statute, not even the Code.”

It is evident that the State of Virginia, having been by contract with her creditors discharged from all liability for the one-third of the old debt represented by the certificates, has no pecuniary interest whatever in the alleged claim against West Virginia for which she sues as trustee; and it will be contended, we presume, that the owners of the unfunded one-third of the ante-war debt, whether it is represented by the canceled bonds held in trust by the State or by the certificates, have any interest whatever in the claim of Virginia for money and property alleged to have been transferred to West Virginia under the acts of 1863. The unfunded one-third of the old bonds formerly held by the Virginia Commissioners of the Sinking Fund and the Literary Fund is in the same position as that belonging to the other creditors. Virginia has solemnly and repeatedly declared that she was not liable for the one-third, has refused to pay it or any part of it, and has canceled the bonds and issued to the Sinking Fund and Literary Fund precisely the same kind of certificates issued to other creditors. The fact, if it be a fact, that the Commissioners of the Sinking Fund and the Literary Fund are agencies of the State, would simply show that the State owed that part of the debt to herself. But the State has released herself from the obligation for one-third of the bonds originally held by these funds and has thereby withdrawn from them that proportion of the sum which she originally intended they should have. Unless, therefore, the two funds, as agencies of the State, now have a valid claim against West Virginia, their demands have been fully satisfied and extinguished. In any aspect, the claim is asserted by

Virginia to recover from West Virginia for contribution on account of money which she (Virginia) has never paid.

The claim against West Virginia under the compact cannot be divided into separate parts, so that Virginia can sue in her own right or for the Commissioners of the Sinking Fund and the Literary Fund for the part represented by the certificates held by those two funds, and also sue as trustee for another part held by different parties. The claim is an entirety and the amount is to be ascertained *in solido*, in the manner provided by compact, and is to be paid in the manner provided by the compact. Whatever the amount might be, it was all payable to Virginia herself, and not to the bondholders, who never had a cause of action against West Virginia, even if the State had been suable; and they cannot create a cause of action for their own benefit, in the name of the State, by the process of having Virginia transfer the indebtedness, or part of it, to them by the enactment of statutes or the issue of certificates or otherwise, and then transferring it back to the State as trustee. But whether the State is, or could be, legally a trustee, or whether, if she be legally a trustee, she could maintain an action in this cause in that capacity, makes no difference in the decision of the question of multifariousness, for the bill and exhibits show that for nearly, if not all, of the unfunded one-third of the debt she actually sues as trustee in this action and not otherwise; and that is sufficient to sustain the contention that there is a misjoinder of parties and a misjoinder of causes of action. Even, therefore, if it should be held that the State is suing in her own right for a judgment and recovery of the amount represented by the certificates held by the two funds, and as trustee for the holders of the other certificates, it would furnish another substantial reason for holding the bill to be multifarious. Besides, it would show that there is a conflict between the personal interests of the trustee and the interests of the *cestuis que trust*, for whatever the trustee might receive in her own right in the distribution of the sum recovered would, to that extent, diminish the portions of the other beneficiaries; and it is a well established rule that plaintiffs whose interests are conflicting cannot unite in the same action—a rule which ought to be rigidly enforced, especially when one of the plaintiffs sues as trustee for the others, and consequently controls the entire proceeding.

Walker v. Powers, 104 U. S., 245.

In view of her own statutes and the agreement she has exacted

from the other holders of certificates, it is difficult to see how Virginia can consistently claim in this action to be suing in her own right to recover any part of the alleged indebtedness of West Virginia on account of the ante-war debt, or, for that matter, on account of any other claim. By statutes she has required her creditors to enter into contracts to defray all the expenses of this proceeding, to release her absolutely, and to accept whatever may be received from West Virginia—whether it be much or little or nothing at all—in full satisfaction and discharge of their claims, and this suit, as alleged in the bill, is being prosecuted under those statutes and agreements.

The bill wholly fails to show a case which entitles the plaintiff to an accounting against the defendant. There are no mutual accounts between the parties, no trust or lien alleged, no fraud, mistake, or concealment, no discovery asked or shown to be necessary, no multiplicity of suits to be avoided, no question as to the application of payments, and no question of apportionment or contribution except upon a basis which is expressly and plainly stated in the compact between the States, and which, therefore, calls for no exercise of the powers of a court of equity. In all its branches, the action is founded on contracts evidenced by the ordinance, and by statutes and constitutional provisions, easily interpreted and involving no question not cognizable in a court of law; and the only possible remedy is a simple judgment for money which a court of law is fully competent to award, if it can be awarded at all in such a case.

In a case where there are no mutual accounts, and no discovery is necessary, the court will not decree an accounting. Story says:

“One of the most difficult questions arising under this head (and which has been incidentally discussed in another place) is to ascertain whether there are any, and if any, what are the true boundaries of equity jurisdiction in such matters of account as are cognizable at law; we may say cognizable at law, for wherever the account stands upon equitable claims or has equitable trusts attached to it, there is no doubt that the jurisdiction is absolutely universal without exception, since the party is remediless at law” (Sec. 454.)

And again he says:

“But in cases where there is a remedy at law, there is no small confusion and difficulty in the authorities. The jurisdiction in matters of this sort has been asserted to be maintainable upon two grounds, distinct in their own nature and yet often running into each other. In the first place, it has

been asserted that where in a matter of account the party seeks a discovery of facts, and these appear upon his bill to be material to his right of recovery, there, if the answer does in fact make a discovery of such material facts (for it would be no ground of jurisdiction if the discovery failed), the courts have at once a rightful jurisdiction of the cause and may proceed to give relief in order to avoid multiplicity of suits" (Sec. 455).

The authorities in support of the propositions we have stated are substantially uniform.

In *Russell v. Clark* (7 Cranch, 89), this court said:

"It is true that if certain facts essential to the merits of a claim, purely legal, be exclusively within the knowledge of the party against whom that claim is asserted, he may be required, in a court of chancery, to disclose those facts, and the court, being thus rightly in possession of the cause, will proceed to determine the whole matter in controversy. But this rule cannot be abused by being employed as a mere pretext for bringing causes properly from a court of law into a court of equity. If the answer of the defendant discloses nothing, and the plaintiff supports his claim by evidence in his own possession unaided by the confessions of the defendant, the established rules, limiting the jurisdiction of courts, require that he should be dismissed from the court of chancery, and permitted to assert his rights in a court of law."

See *Fowle v. Lawson*, 6 Pet., 495; *Dowell v. Mitchell* and *Mitchell v. Dowell*, 105 U. S., 430 (and the authorities therein cited); *Consolidated Safety Valve Co. v. Ashlan*, 26 Fed., 369; *Lord v. Whitehead*, 24 Fed., 421; *Gunn v. Brinkley*, etc., 66 Fed., 382.

French v. Hay, 22 Fed., 231-237, was a bill for an accounting, and the court said:

"And where it conceded that by the instrument through which he claims, French became the owner of the judgment, as between himself and Hay, we do not perceive how the concession could aid him in this case. If, as the bill avers, Hay collected the judgment and now holds the money for the use of the complainant, there is a complete remedy at law. This is not a bill for discovery and the aid of the court of equity is not needed."

It is shown by the bill in this case that the State of Virginia has in her own possession all the accounts, vouchers, and documents relating to the amount of the old indebtedness, and all the charges and

credits that should be made against and in favor of West Virginia on the settlement provided for in the compact, and she offers to produce them before the master. The prayer of the bill asks that the defendant State "may be required to produce before such auditor or master, so to be appointed, all such official entries, documents, reports and proceedings as may be among her public records or official files and may tend to show the facts and the true and actual state of accounts growing out of the matters and things above recited and set forth," etc., etc.; but it is not alleged anywhere in the bill that the State of West Virginia has in her possession, or under her control, any such entries, documents, reports, or proceedings.

There is no semblance of a ground for the intervention of a court of equity in this case unless it be the fact that the jurisdiction of such a court can be invoked merely because the accounts necessary to be examined in deciding the controversy between the parties are voluminous or tedious; but in the case of *Brown v. Chase*, 94 U. S., 81, the court said:

"If the evidence is merely voluminous or tedious, that circumstance is not sufficient cause for transferring a case from a court of law to a court of equity" (p. 824).

But it is unnecessary to discuss this question at length, for the distinction between the common law and equity jurisdiction of the courts of the United States under the constitution has been so often stated and explained in the decisions of this court that it would be tedious to repeat them here.

For cases in which this distinction is stated, see—

- Fenn v. Holmes*, 21 How., 491;
- Robinson v. Campbell*, 8 Wheat., 221;
- Strather v. Lucas*, 6 Pet., 768;
- Parish v. Elkins*, 16 Pet., 453;
- Bennett v. Butterworth*, 11 How., 669;
- Galt v. Galloway*, 4 Pet., 432.
- Young v. Porter*, 3 Woods, 342;
- Scott v. Seely*, 140 U. S., 106;
- Hipp v. Robbins*, 19 How., 271.
- Parker v. Winnipiseogee et al.*, 2 Black, 545;
- Grand Chute v. Winniver*, 15 Wall., 373;
- Lemon v. Coches*, 23 Wall., 461;
- Killian v. Ebbinghaus*, 110 U. S., 468.

There is no allegation in the bill that any authority has been given for the prosecution of this action on behalf of the State of Virginia, except for the single purpose of securing an adjustment of the proportion of the old debt proper to be borne by the State of West Virginia. The plaintiff State has already determined for herself what her just proportion of the debt is, and neither asks nor is willing to have that question reopened. The only authority for the institution of the suit is found in the act of March 6, 1900, which relates exclusively to the ascertainment of West Virginia's proportion of the debt represented by the certificates deposited with the commission, and provides that "the said commission shall be authorized and empowered by and with the advice and approval of the Attorney-General of Virginia to take such action and institute such proceedings in behalf of the State as may, in the judgment of said commission and Attorney-General, be needful and proper to protect the interests of the State and bring about and carry into effect a settlement as aforesaid." This is the whole extent of the authority given for the use of the name of the State in this action, and it is expressly limited to an action or proceeding on her behalf as trustee for the certificate-holders; and, as we have already shown, this court cannot entertain that part of the bill.

It was held by the court in *Texas v. White* (7 Wall., 700) that the governor of a State had the power to authorize the institution of an action by the State in a case where the interests of the State itself were involved; but no such rule can be applied where the suit is not for the assertion of a claim or the protection of a right belonging to the State, but for the sole benefit of individuals, and she sues as their trustee. In such a case the legislature possesses the sole authority to direct its institution. But, whether this is the general rule or not, the fact in this case is that the legislature, the supreme authority of the State, did assume and exercise control over the subject, and by an act which was approved by the governor, specifically defined the purpose for which the name of the State might be used.

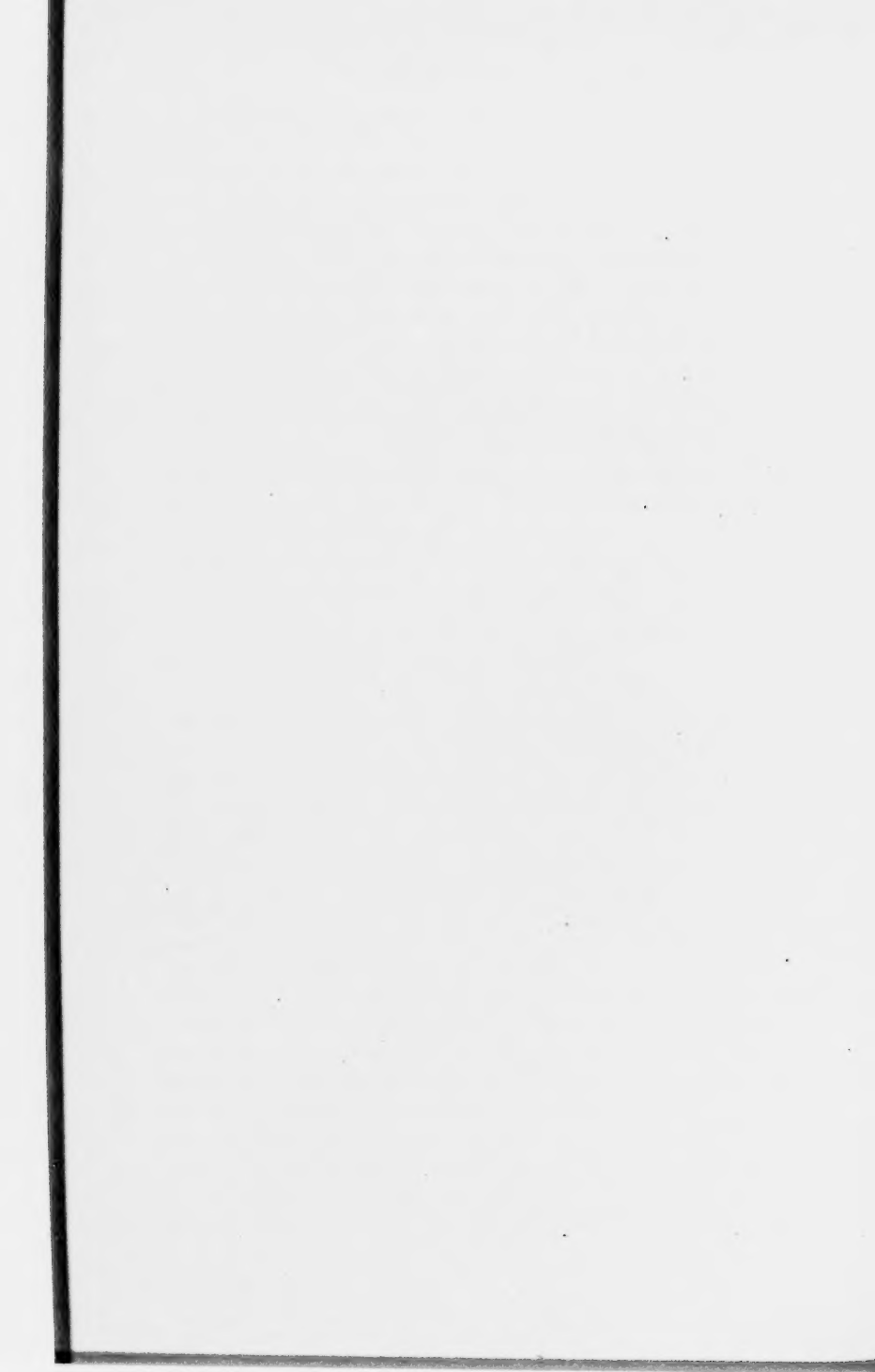
Ordinarily the objection that the suit was brought without authority from the party named as plaintiff should be taken by a plea in abatement, but where the lack of authority appears on the face of the bill of complaint, the question can be raised by demurrer. For instance, in a case where diverse citizenship is necessary to confer jurisdiction, and it appears on the face of the bill or complaint that the plaintiff and defendant are citizens of the same State, or even where it does not appear that they are citizens of different States,

no plea in abatement is necessary, and a demurrer to the jurisdiction will be sustained.

The demurrer in this case calls the attention of the court to the fact that the bill contains no prayer for a judgment or decree or any other final relief. (*See Equity Rule 21.*) It merely asks that the principles upon which an accounting shall be had "may be ascertained and declared;" that an accounting may be had, and that the plaintiff may be granted such other and further general relief as the nature of the case may require or to equity may seem meet. We do not suppose a decree or judgment for the recovery of money or property can be rendered upon a mere prayer for general relief; but this is not a matter of great importance, because the bill might be amended in this particular.

We respectfully submit that the demurrer should be sustained and the bill dismissed.

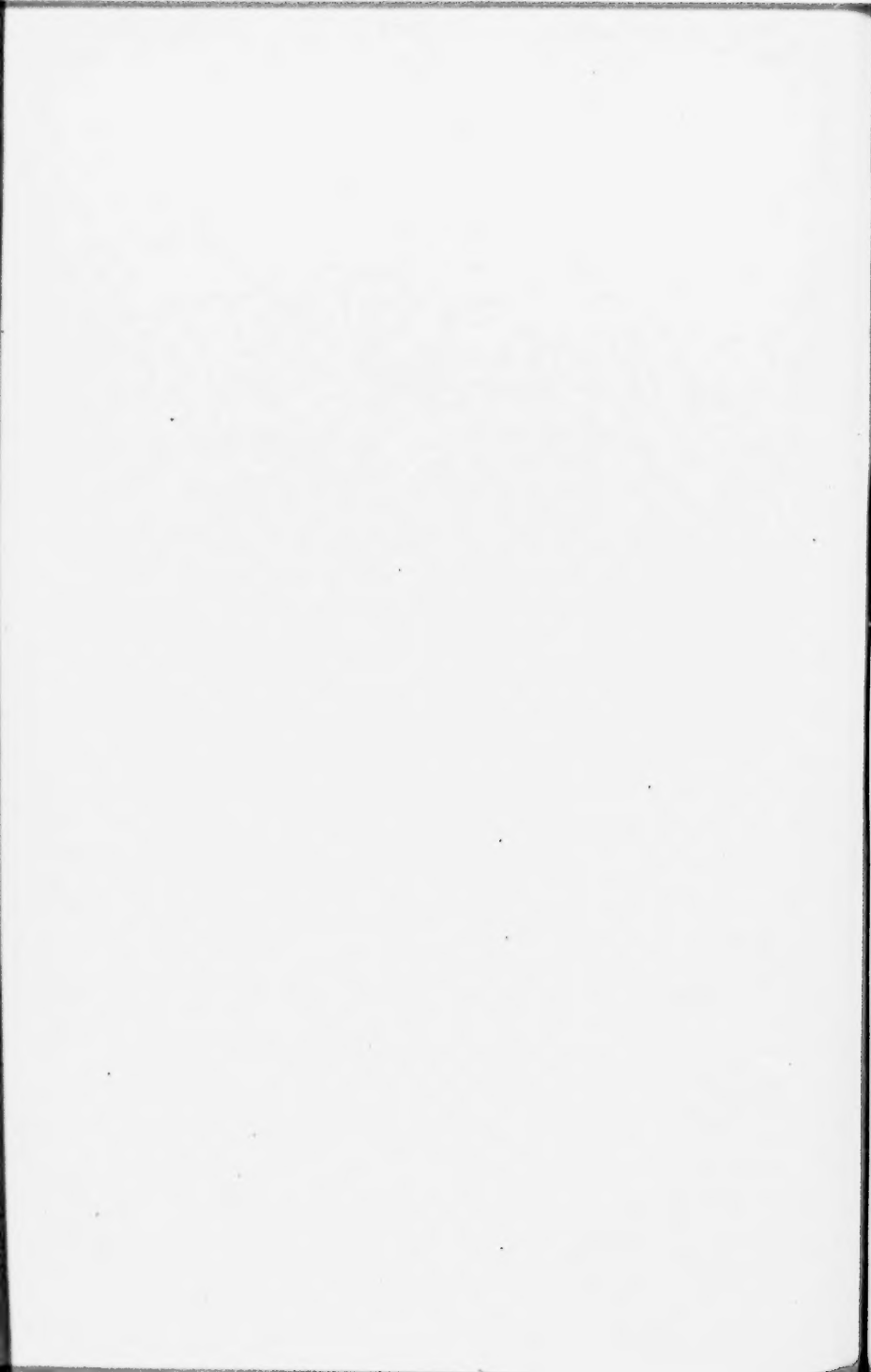
J. G. CARLISLE,
For West Virginia.



Supreme Court of the United States.

OCTOBER TERM, 1906.

Brief for Plaintiff



IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

Original, No. 7.

COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

BRIEF OF COUNSEL FOR VIRGINIA UPON THE QUESTIONS RAISED BY THE DEMURRERS.

Statement of Facts as Shown by the Bill.

I.

On the 20th of June, 1863, West Virginia became a State of the American Union pursuant to an act of the United States Congress approved December 31, 1862, and in accordance with a proclamation of President Lincoln made April 20, 1863, under the act of Congress, upon the terms and conditions prescribed by the Commonwealth of Virginia in an ordinance adopted in convention and in the acts passed by the General Assembly of the restored government of the Commonwealth giving her consent to the formation of the new State out of her territory, with the constitution adopted for the new State by the people thereof, and which was sanctioned by Congress.

II.

Prior to the formation of the new State, the Commonwealth of

Virginia had contracted an indebtedness approximating, as of the first day of January, 1861, the sum of \$33,000,000, evidenced by the contracts and obligations of the undivided State.

This large indebtedness had been created in constructing a system of public highways, turnpikes, canals, railways, and other public internal improvements, begun in the first quarter of the nineteenth century and designed to fairly develop every part of her territory, and to afford means of communication between the different sections of the Commonwealth and the seashore, and to give to the people in all the various portions of the State access to the best available markets.

The "vast potentialities of wealth and revenue in the undeveloped stores of minerals and timber, which had been known for years prior to the date named (1861), and their prospective values, if made accessible to the markets of the country, were understood to be well nigh beyond computation." Accordingly the costly system of highways, canals, and railways thus projected were designed, begun, and in very great measure constructed, *for the purpose of developing the resources of the region afterwards embraced in the State of West Virginia*, and of giving to its people adequate facilities of communication with other portions of the Commonwealth and access to the seashore and to the markets of the country.

This system of internal improvement and the large indebtedness contracted in carrying it into execution received the sanction of the people of the counties subsequently constituting West Virginia, through their representatives in the General Assembly of the undivided State, and a very large portion of that indebtedness would not have been created but for the votes of the members of the General Assembly representing those counties; and little or none of that indebtedness would have been contracted had the representatives from the counties subsequently forming the State of West Virginia voted against its creation. Several millions of dollars of said indebtedness were contracted on account of the works of internal improvement constructed in the territory now constituting West Virginia.

III.

The 9th section of the ordinance adopted by the people of the restored State of Virginia, in convention assembled in the city of Wheeling, Virginia, on the 20th day of August, 1861, entitled "An

ordinance to provide for the formation of a new State out of the portion of the territory of this State," provided as follows:

"9. The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, 1861, to be ascertained by charging to it all of the State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government since any part of said debt was contracted, and deducting therefrom the moneys paid into the treasury of the Commonwealth from the counties included within the said new State during said period. All private rights and interests in lands within the proposed State, derived from the laws of Virginia prior to such separation shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in the State of Virginia."

Upon this stipulation and condition, afterwards accepted and acted upon by the people of West Virginia, the consent of the Commonwealth of Virginia was given to the formation of the new State.

IV.

Before the creation of the State of West Virginia, and while the territory and the people afterwards constituting the State still formed a part of the Commonwealth of Virginia and were subject to its jurisdiction and laws, the General Assembly of the restored State of Virginia, on the 3d day of February, 1863, enacted the following law:

"That all property, real, personal and mixed, owned by, or appertaining to this State, and being within the boundaries of the proposed State of West Virginia, when the same becomes one of the United States, shall thereupon pass to, and become the property of the State of West Virginia, and without any other assignment, conveyance or transfer or delivery than is herein contained, and shall include among other things not herein specified all lands, buildings, roads, and other internal improvements or parts thereof, situated within said boundaries, and vested in this State, or in the president and directors of the literary fund, or the board of public works thereof, or in any persons or persons for the use of the State, to the extent of the interest and estate of this State therein; and shall also include the interest of this State, or of the said president and directors, or of the said board of public works, in any parent bank or branch

doing business within said boundaries and all stocks of any other company or corporation, the principal office or place of business whereof is located within said boundaries, standing in the name of this State, or of the said president or directors, or of the said board of public works, or of any person or persons, for the use of this State.

5. That if the appropriations and transfers of property, stocks, and credits provided for by this act, take effect, the State of West Virginia shall duly account for the same in the settlement hereafter to be made with this State, provided that no such property, stocks and credits shall have been obtained since the reorganization of the State government."

And by another act of the General Assembly of the restored State of Virginia, passed February 4, 1863, it was enacted as follows:

"1. That the sum of one hundred and fifty thousand dollars be, and is hereby appropriated to the State of West Virginia out of moneys not otherwise appropriated, when the same shall have been formed, organized and admitted as one of the States of the United States.

2. That there shall be, and hereby is appropriated to the said State of West Virginia when the same shall become one of the United States, all balances, not otherwise appropriated, that may remain in the treasury, and all moneys not otherwise appropriated, that may come into the treasury up to the time when the said State of West Virginia shall become one of the United States: provided, however, that when the said State of West Virginia shall become one of the United States, it shall be the duty of the auditor of this State, to make a statement of all moneys that up to that time, have been paid into the treasury from counties located outside of the boundaries of the said State of West Virginia, and also of all moneys that up to the same time, have been expended in such counties, and the unexpended surplus of all such moneys shall remain in the treasury and continue to be the property of this State."

These two statutes of the restored government of Virginia validly prescribed the terms and conditions upon which the property and money therein mentioned should be transferred to the new State, when it should be formed; and, pursuant to their provisions, money and property amounting to and of the value of several millions of dollars were, after the formation of the new State, paid over and transferred to and accepted by West Virginia.

The constitution of the State of West Virginia, which became effective when she was admitted into the Union pursuant to the said

act of Congress and proclamation of President Lincoln, contained the following provisions:

By section 5 of article VIII of said Constitution it was provided:

“5. No debt shall be contracted by this State except to meet casual deficits in the revenue, to redeem a previous liability of the State, to suppress insurrection, repel invasion, or defend the State in time of war.”

And by section 7 of article VIII it was provided:

“7. The legislature may, at any time, direct a sale of the stocks owned by the State, in banks and other corporations, but the proceeds of such sale shall be applied to the liquidation of the public debt, and hereafter the State shall not become a stockholder in any bank.”

And by section 8 of article VIII it was provided:

“8. An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this State, and the Legislature shall ascertain the same as soon as may be practicable and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years.”

At the time the constitution containing these provisions was adopted by West Virginia that State did not owe, and could not have owed, any “public debt” or “previous liability,” except for her just contributive portion of the public debt of the original State of Virginia, and for the money and property of the original State which had been transferred to and received by her under the acts of the General Assembly of the restored State of Virginia as above set forth, enacted while the territory and people afterwards forming the State of West Virginia constituted a part of the Commonwealth of Virginia.

The provisions of sections 7 and 8 of article VII of said constitution were embodied therein by the people of West Virginia, or their representatives, for the purpose of complying with and carrying out in good faith the stipulations and conditions upon which the consent of Virginia was given to the formation of the State of West Virginia, and to the transfer of the money and property aforesaid to said new State.

VI.

After the formation of the State of West Virginia and after the restored government of Virginia had become the only government of the Commonwealth and its authority recognized and established throughout her limits, at intervals after the years 1865 down to and including the year 1905, various efforts were made by the Commonwealth of Virginia, through its constituted authorities, to bring about and effect an adjustment and settlement with West Virginia of the equitable proportion of the public debt of the undivided State proper to be borne and paid by the State of West Virginia. All of these efforts proved unavailing and abortive; and for years West Virginia has refused or failed to take any action or do anything for the purpose of bringing about any adjustment or settlement with this State.

Only after exhausting every means of amicable negotiation and having her overtures to that end repeatedly refused, and as a last resort, has Virginia been constrained at length reluctantly to apply to this, the only tribunal which can afford relief, for an adjudication and determination of this question, of such vast importance to her and to all of her people.

VII.

Without waiting for a settlement with West Virginia, the Commonwealth proceeded, fully recognizing her liability for an indebtedness, all of which stood in her name, soon after the establishment of its restored government at Richmond, to make provision for the settlement and payment of the portion of the common debt of the undivided State which she could be fairly expected to assume and pay, under the circumstances then existing and the conditions which confronted her.

Several efforts were made to effect such an adjustment and settlement, the most important of which was that embodied in the act of March 30, 1871, mentioned at page 7 and copied at pages 13 to 16 of the bill.

By reason of the then impoverished condition of her people, occasioned by disasters which had destroyed their resources and paralyzed their productive energies, it was soon apparent that Virginia, in assuming and capitalizing, and again recapitalizing, the accrued interest upon the debt of the original State, and undertaking to pay, with 6 per cent. interest, two-thirds of the aggregate sum thus

ascertained, had assumed a heavier burden than she was able to bear. Accordingly other plans for the settlement of the State debt were adopted, and a final adjustment made under the act of February 20, 1892, set forth in the bill.

As a result of this, it will be seen that Virginia has assumed and already actually paid off and retired, exclusive of the large amounts she has paid on account of interest, a *principal sum* aggregating as much as, or more than, the entire principal sum of the debt of the undivided State as of January 1, 1861.

The facts in regard to these various transactions and the adjustment made by Virginia with the common creditors of the old State are recited in the bill merely for the purpose of showing the present status of the public debt of the original State and the precise relation of this Commonwealth at the present time in respect thereto.

Of course, the rights of West Virginia cannot be affected by any of these transactions between Virginia and the common creditors, of the undivided State, except to the extent that Virginia's rights and action therein may entitle her to contribution from West Virginia.

VIII.

As indicating the character of the efforts and sacrifices which Virginia, notwithstanding the disasters and losses which her people have endured, has made, in order to bear and to discharge her just obligations on account of the common debt of the undivided State, and as showing something of the strength of her equitable claim against West Virginia, it must be remembered that she has actually paid off, retired, and discharged and satisfied, so far as West Virginia is concerned, as of the date of the institution of this suit, over \$71,000,000, including principal and interest, on account of said common indebtedness.

While Virginia has made this large contribution towards the settlement of the common debt, West Virginia has not paid one dollar thereof.

IX.

Since January 1, 1861, the arbitrary date fixed by the Wheeling ordinance as of which the adjustment and settlement between the two States shall be made, Virginia has actually paid off and retired, and now holds in her own hands and for her own benefit, exclusive of the sums represented by the certificates issued under the funding acts aforesaid, obligations of the undivided State amounting in the

aggregate, including the interest to be fairly computed thereon to date, to a sum in excess of \$25,000,000. For all of the obligations and indebtedness of the original State, so taken up and retired or paid off by her, Virginia has a just claim against West Virginia for contribution to the extent of West Virginia's equitable liability therefor.

X.

As a part of the adjustment which Virginia from time to time has made with the holders of the bonds and obligations of the undivided State and as a proper stipulation in connection with the partial settlements thereof made by her, it was agreed between them and Virginia that upon giving to them respectively her obligations for the respective portions of each of the old bonds of the undivided State agreed to be assumed and paid by Virginia, these old original bonds should be deposited with Virginia, and so far as not thus funded by her in her own obligations should be held by her as trustee for the holder or his assigns; and to each of these parties thus entitled she has given her certificate to this effect.

By the terms of the settlements authorized by the acts of 1879, 1882, and 1892, set forth in the bill, no liability rests upon Virginia on account of the certificates given by her pursuant to the terms of those acts, for the bonds deposited with her, and to be held by her, to await a settlement with West Virginia, as to the portion thereof not assumed or paid by Virginia. But it has been suggested that, although there is no liability assumed by Virginia by reason of issuing said certificates or upon said certificates, that there may still be a liability upon her *as to the unfunded portion of the bonds deposited with her under the acts of 1879, 1882, and 1892*. This, however, is a matter of minor importance, because a comparatively small portion of the old debt of the State was funded under the acts of 1879, 1882, and 1892, as will appear from the circumstance that there are in all only \$1,609,600.15 of the certificates issued under the last-mentioned three acts outstanding in the hands of the public, as shown by the exhibit at page 73 of the bill.

The great bulk of the debt of the old State was funded under the act of 1871, and the unfunded portion of the bonds deposited with Virginia by the public creditors under the terms of that act, amounted to \$12,703,451.79, upon the principal interest-bearing sum of which there is interest due from July 1, 1871. (See Exhibit No. 1, page 13 of the bill, and statement of Second Auditor of Virginia,

embodied in the address of Mr. Randolph Harrison, found at page 73 of the bill.)

The arrangement under the funding act of 1871 was very different from that provided for by the subsequent acts of 1879, 1882, and 1892.

By the acts of 1871 Virginia undertook to be the custodian of the bonds of the undivided State deposited with her, so far as they were unfunded; and that payment should "be provided for in accordance with such settlement as shall hereafter be had between the States of Virginia and West Virginia in regard to the public debt of the State of Virginia existing at the time of its dismemberment."

Whatever may have been the purpose of the General Assembly of Virginia in the enactment of this law and in authorizing such contracts to be made, it would seem that Virginia's legal liability on account of said unfunded portion of said bonds is not released or affected by the transaction, but still exists.

However, under all the circumstances of the case and in view of the underlying equities suggested by the facts stated in the bill, it would seem that Virginia has already unquestionably done as much as she could be fairly expected to do towards paying off the common public debt of the old State. The great mass of the holders of the certificates issued by her under the act of 1871, and under the other acts above recited, who are the persons entitled to the said unfunded bonds deposited with her and now held by her, recognizing the justice of this view, have, through their authorized representatives, entered into the agreement printed at pages 83 to 86 of the bill.

XI.

By joint resolution of the General Assembly of Virginia, printed as Exhibit No. 5, beginning at page 39 of the bill, entitled—

"A joint resolution to provide for adjusting with the State of West Virginia the proportion of the public debt of the original State of Virginia proper to be borne by West Virginia, for the application of whatever may be received from West Virginia to the payment of those found to be entitled to the same,"

approved March 6, 1894, a commission was created for the purposes set forth in the title to the resolution.

The Virginia Debt Commission mentioned in the bill was created pursuant to that resolution, and made earnest efforts to bring

about a settlement with West Virginia, without any satisfactory result.

Accordingly the General Assembly of Virginia afterwards passed the act approved March 6, 1900, printed as Exhibit No. 6 of the bill, beginning at page 41 thereof, the object of which is stated in its title as follows:

“An act to provide for the settlement with West Virginia of the proportion of the public debt of the original State of Virginia proper to be borne by West Virginia, and for the due protection of the Commonwealth of Virginia in the premises.”

By this act, as plainly appears from its terms, additional powers and authority were conferred upon this commission, and it was made its duty, and power was conferred upon it, by and with the advice and approval of the Attorney-General of the State, to take such action and institute such proceedings on behalf of the State as may, in the judgment of said commission and Attorney-General, be needful and proper to protect the interest of the State and bring about and carry into effect a settlement as aforesaid.

After again making an earnest effort to bring about an amicable settlement with West Virginia, by which the proportion of the debt of the original State of Virginia proper to be borne by West Virginia should be ascertained, and after having had their overtures to that end rejected by West Virginia, the said commission deemed it to be its duty, with the advice and approval of the Attorney-General of Virginia, to cause this suit to be brought in strict conformity with the powers conferred upon them by the acts aforesaid, the commission and the Attorney-General considering such action to be needful and proper to protect the interest of the State and bring about and carry into effect such a settlement.

Accordingly, and in strict conformity with the authority conferred by the act of March 6, 1900, this suit was instituted.

BRIEF OF ARGUMENT UPON THE QUESTIONS OF LAW
PRESENTED BY THE DEMURRERS.

(1.)

As to the first ground alleged in the amended demurrer, namely, that there is a misjoinder of parties plaintiff and a misjoinder of causes of action, we cannot see that this objection is well taken.

The definitions of misjoinder under English chancery practice, as well as the practice in this country, show that there is no such vice in the bill.

(a) As to the misjoinder of parties: This does not arise unless—

“Complainants actually have or may have conflicting interests in regard to the object of the suit, or if any or either of them have no interest in the subject-matter of the suit.”
Mitf. Pl., p. 399, note.

The rule as to misjoinder of plaintiffs, as laid down by Mr. Daniell, is that—

“persons who have no interest in the litigation cannot be joined as coplaintiffs in a suit with those who have.”
1st Daniell Chy. (5th Am. ed.), m. p. 301.

Example given by Mr. Daniell of what is not misjoinder; Auctioneer can be joined as coplaintiff with the vender in a bill against the purchaser.

Id., m. p. 302.

Again: Want of interest by a coplaintiff in the subject matter is ground for demurrer.

Story's Eq. Pl., sections 231, 232, 508, and 509.
Mitf. Pl., 160, 161.

Again: Plaintiffs who have no common interest, but assert distinct and several claims against one and the same defendant, cannot be joined.

Story's Eq. Pl., section 279.

On the other hand, where there is a community of interests among coplaintiffs desiring the same relief against a common defendant, they may be joined.

It was held in *Ware vs. Duke of Northumberland*. 2 Anstruther's Rep., p. 469, that:

"Unconnected parties might be joined in one suit *where there was a common interest among them all, centering in the point in issue in the cause.*"

This doctrine is strongly approved by Chancellor Kent in *Brickenhoff et als. vs. Browns*, where different judgment creditors united in one bill for discovery and account to set aside impediments to their remedies at law caused by the fraudulent acts of their common del tor.

c Johnson Chy., 139, 151, 152.

Chancellor Kent says at page 151:

"It is an ordinary case in this court, for creditors to unite or for one or more, on behalf of themselves and the rest to sue the representative of their debtor in possession of the assets, and to seek an account of the estate.

"This is done to prevent a multiplicity of suits, a very favorite object with this court; and this principle so far controls the other rule, which preserves, in some degree, an analogy between pleadings in chancery, and the simplicity of declarations at common law. *There is no sound reason for requiring the judgment creditors to separate their suits, when they have one common object in view, which, in fact, governs the whole case.*" (Italics here and elsewhere ours.)

Story's Eq. Pl., section 286; see also 2d Story's Eq. Jur., sections 853, 854.

(b) Nor is there any foundation whatever for the objection that there is a misjoinder of causes of action.

Considering together the two grounds of objection which are jointly presented in the first assignment of grounds of demurrer made in the amended demurrer in the light of the established doctrines and definitions, we beg leave to say that they are both founded upon an utter misapprehension of the meaning, scope, and purpose of the bill.

It is impossible that there can be any misjoinder of parties plaintiff, because there is only one party plaintiff. Virginia, in her corporate capacity, is the only plaintiff in the suit. She does not sue in any representative capacity, though the bill discloses the fact that, by reason of the arrangements which she has made with the great mass of the holders of the bonds of the old State, she does

hold in her possession nearly all of those bonds as a depository, and *quoad* the custody thereof that she holds them in a fiduciary capacity; but she does not sue as trustee, but sues in her own name, for the purpose of obtaining the equitable relief to which the bill shows that she is fairly entitled.

In so far as said bonds have been funded in her own obligations and discharged by her, she holds those bonds as vouchers and evidence of her satisfaction of the same against the State of West Virginia, who is, as a proposition of public law and of equity, bound jointly with her to the public creditors to pay the same, and, as between her and West Virginia, is bound by contract to pay West Virginia's equitable proportion thereof.

If Virginia had no personal interest in respect to the bonds so deposited and held by her in a fiduciary capacity, we would cheerfully concede that she would have no standing to maintain this suit in respect to *these bonds*; but Virginia not only has an interest, but a very great interest, in respect to the unfunded and unsatisfied bonds of the old State, which, confiding in her fair dealing, the public creditors have entrusted to her custody, and in the settlement by West Virginia of her fair equitable proportion of the indebtedness of the undivided State represented by these bonds; *and that interest is that she shall be exonerated, at least to the extent of West Virginia's liability therefor, from any obligation to pay the same.*

To obtain such just exoneration she has invoked the equitable jurisdiction of this court.

Not only is she entitled to maintain and prosecute this suit, in order to obtain the exoneration which, according to the general principles of equity she is entitled to be decreed, but, by the special contract between her and the parties entitled to these bonds, she has, without any prejudice to the rights of West Virginia or any violation of any duty she owes to West Virginia, and without doing anything of which West Virginia has any ground whatever for complaint, acquired a still greater interest and right, namely, to be entirely exonerated from any liability on account of the unfunded portion of the common debt represented by the bonds so deposited with her and by the certificates which she has issued therefor.

This interest is given to her by the express terms of the contract which she has made with these certificate-holders, who are the owners of the bonds of which she is the custodian, and who, recognizing the enormous contributions which she has made from her limited

means to the satisfaction of the common debt, have cheerfully agreed to accept whatever amount this court shall ascertain to be the just and equitable proportion of the common debt of the old State to be borne by West Virginia, in full discharge and satisfaction of any claim they may have against Virginia and in full acquittance of all demands against her. (See 4th clause of contract, p. 85 of bill.)

It will be observed that, as has been already suggested, this stipulation, though it inures to the protection and to the interest of Virginia, in no sense and by no possibility is or can be prejudicial to any right of West Virginia; for under no circumstances could or will this agreement operate to add one cent to the liability of West Virginia.

We respectfully submit that her equitable right to exoneration from liability as to these unsatisfied and unfunded bonds, of which she is the custodian, alone gives her a standing to maintain this suit to have West Virginia's liability, not only for the whole indebtedness of the undivided State, but for the bonds so deposited with her, ascertained, determined, and adjudicated; and that her contractual right to exoneration under her agreement with the parties equitably entitled to those bonds increases her interest and confirms her right to have such exoneration decreed.

An authority of respectability and of proven merit has said:

"It was not necessary to wait till some one was damnified by having paid, or having claim made against him for the whole; a bill might be filed to settle the amount due from each individual of a body liable to a common burden, and to compel the payment by each, of his share."

2 Spence Equitable Juris., marginal p. 662.

This suit is brought, as appears plainly from the bill, for the purpose of obtaining a *complete settlement* with West Virginia and an adjustment of a controversy which has vexed both States for a generation past; and as a part of this settlement and as a necessary incident to it, and in accordance with the manifest equitable rights of Virginia to have that settlement decreed—

First, in respect to some \$25,000,000, including principal and interest, of the obligations of the original State, which have been paid off or retired by the Commonwealth of Virginia since her dismemberment and the vouchers for which transaction she now holds in her treasury; and as to this she invokes the equitable jurisdiction of this court for *contribution* from West Virginia to the extent of

West Virginia's liability on account of the common obligations which Virginia has thus paid off and retired; and,

Second, to obtain the *exoneration* to which she is entitled in respect to the unsettled and unfunded one-third of the debt of the undivided State, the obligations evidencing which have been deposited with her.

There is no possible conflict between or inconsistency in the two kindred and associated rights of contribution and of exoneration thus possessed by Virginia, or in the assertion of the same in one common suit. Indeed, it is proper and right that they should be asserted and united in one suit, and it would be ground of objection not to include them in one suit.

This would be true, even if there were more than one party, who had such rights, plaintiff to the bill; but, in the nature of things, there is and can be but one party plaintiff here, because there is only one Commonwealth of Virginia; and, as to her, "there is a common interest centering in the point of issue in the cause," and, in every phase and aspect of the cause, a common right in her capacity as a creditor of West Virginia in respect to so much of the common debt as Virginia has settled and paid off in full, and in her capacity of co-obligor of West Virginia as to so much of the common debt as remains unsatisfied, to have a settlement and ascertainment and adjudication of the equitable proportion of the debt of the undivided States which West Virginia should pay.

The effect and logical consequence of such an ascertainment and adjudication will necessarily be to obtain contribution to Virginia by West Virginia to the extent of West Virginia's equitable liability to make such contribution, and to obtain exoneration of Virginia from any farther liability on account of the common debt of the old State; and this is the ultimate relief to which Virginia is justly and equitably entitled, upon the showing made by her bill.

Again, the two causes of complaint united in this bill, and on which relief is prayed, are:

1. The liability of West Virginia to Virginia for her reasonable and just contributive share of the public debt of Virginia as of the 1st of January, 1861.

This liability rests upon several distinct and evident grounds:

- (a) On the principle of public law, that "where a State is divided into two or more States, in the adjustment of liabilities between

each other the debts of the parent State should be ratably apportioned among them" (*Hartman vs. Greenhow*, 102 U. S., 877.

(b) On the ordinance of the convention of Virginia of August 20, 1861, "to provide for the formation of a new State out of the portion of the territory of this State," by section 9 of which ordinance it was provided that "the new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861," &c.

(c) On the constitution formed by the State of West Virginia and submitted to Congress, and on which West Virginia was admitted into the Union (*Virginia vs. West Virginia*, 11 Wall, 43).

By section 8 of article 8 of said constitution it was provided that—

"An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this State, and the legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

2. Under and by virtue of the act of the General Assembly of the restored government of Virginia, passed February 3, 1863, property of the Commonwealth of Virginia, to the amount in value of several millions of dollars, was transferred from Virginia, and was delivered to and received by West Virginia, on the express condition that "the State of West Virginia shall duly account for the same in the settlement hereafter to be made with this State, provided that no such property, stocks and credits shall have been obtained since the organization of the State government."

And by act of the same General Assembly, passed February 4, 1863, the sum of one hundred and fifty thousand dollars (\$150,000) was appropriated and subsequently paid over to West Virginia, and by the same act all moneys and balances in the treasury of Virginia not otherwise appropriated were appropriated to the said State of West Virginia.

It is too plain and obvious to be questioned, that both of the two above-recited grounds of complaint grew out of and formed material parts of the same transaction, viz, the generation of the new State of West Virginia and its necessary sustenance and support while in

her infancy. By her very birth, West Virginia incurred the liability for her just proportion of the public debt of Virginia. It was in fact and in law her debt as much as it was the debt of Virginia. She inherited it. It was congenital. Then, at her birth, West Virginia was wholly without resources or means for maintaining herself and continuing her political existence twenty-four hours save by the money and property of Virginia which fell into her hands. The appropriation of this money and property to the uses of West Virginia created a debt of so high an obligation that, even without the express condition on which it was given and received, she would be compelled to account for it.

Can there be doubt, then, for one moment that these two grounds of complaint are so intimately and essentially connected as that, had this complainant brought her separate bill on each ground, this court would, to avoid so useless multiplicity of actions, have consolidated or caused them to be heard together? The people who appeared as the citizens of the restored government of Virginia and who formed the conventions and General Assemblies by which ordinances were framed for the creation of the new State of West Virginia—and consent was given in the name of Virginia for the creation of such new State—and who appropriated millions of dollars in value of the property of Virginia for the use of West Virginia were, it may be, in legal contemplation, citizens of Virginia up to the 20th day of June, 1863; but on that day these same people became citizens of West Virginia and thenceforth sat in conventions of her people and in her halls of legislation. But before this transformation took place, and in contemplation of its assured coming, they, as citizens of Virginia, appropriated all her property within their reach and gave it to the embryo State.

So it appears by the allegations of this bill, which must be taken here to be true, that West Virginia is justly liable on many grounds for a just proportion of the public debt of her parent State, Virginia; that West Virginia has not only repudiated and openly disavowed all such liability, but that she has appropriated to her own use a large amount in value of the public property of Virginia, which Virginia might properly have applied, as part of her public assets, to the payment of her public debt; and now, when by this bill in equity Virginia calls on West Virginia to account for the property which she has appropriated and applied to her own uses, and to come in before this court and have her proportion of the public debt ascertained, West Virginia, by her demurrer, protests that the part

of the public debt which she owes and the part of the public assets which she has appropriated to her own use are two subjects of complaint so distinct and unconnected as should relieve her from making answer to the bill.

Counsel for the defendant rely upon the decision of this court in the cases of *New York vs. Louisiana* and *New Hampshire vs. Louisiana*, 108 U. S., 78; but, as has already been made apparent, this case is entirely different in fact and in principle from those cases; indeed, there is no analogy between them.

Neither the State of New York or New Hampshire had any direct or personal interest in the bonds of Louisiana or in the subject-matters of controversy in those suits, but were mere volunteers, self-constituted trustees, without sustaining any relation, or interest, or obligation, or liability in regard to the bonds, or to any question presented in those causes.

While it may be true that, as to the custody of some of these unsatisfied bonds, Virginia sustains the relation of trustee, she has an enormous interest as to those bonds—an interest as substantial and as real, if not in fact as great, as if she had actually paid these bonds in full.

(2.)

The next ground of demurrer assigned by the defendants is:

“That this court has no jurisdiction of either the parties to or the subject-matter of this action, because it appears by the said bill that the matters therein set forth do not constitute, within the meaning of the Constitution of the United States, such a controversy, or such controversies, between the Commonwealth of Virginia and the State of West Virginia as can be heard and determined in this court, and this court has no power to render or enforce any final judgment or decree therein.”

This ground of objection is based upon two postulates, each of which, we respectfully submit, is fallacious as applied to this case.

The first is, as we understand the position of defendant's counsel, that the judicial power of the United States and the jurisdiction conferred by section 2 of article III of the Constitution of the United States upon the Supreme Court over “controversies between two or more States” does not embrace a controversy such as is presented here, or any other controversy which, like the one here, is based upon any pecuniary obligation or liability of a State; that while it does

not confer jurisdiction upon the Supreme Court of the United States over certain controversies between States, the word "controversy" as used in that section of the Constitution, does not embrace any controversy in regard to any pecuniary matter.

This second postulate which defendant's counsel must maintain to support the above objection is necessarily that the language of the Constitution referred to does not confer jurisdiction in any case in which the court has no power to render or enforce and make effective its final judgment thereon, and that this court cannot render or enforce its final judgment or decree making effective the relief sought by the plaintiff.

We will now consider this two fold ground of objection:

(a) Can it be true that the word "controversy" as thus used in section 2 of article III of the Constitution can be fairly given any such narrow construction and confined by any such forced and restricted limitations?

It will be observed that precisely the same word defines the jurisdiction of this court as to "controversies between citizens of different States."

Judge St. George Tucker, in discussing the judiciary clauses of the United States Constitution, says, in his appendix to Tucker's Blackstone, vol 1, p. 120, edition of 1892:

"The word 'controversies,' as here used, must be understood as relating to such as are of civil nature. It is probably unknown in any other sense, as I do not recollect ever to have heard the expression 'criminal controversy.' As here applied, it seems particularly appropriate to such disputes as might arise between the United States and any one or more States, respecting territorial or fiscal matters; or between the United States and their debtors, contractors and agents. This construction is confirmed by the application of the word in the ensuing clauses, where it evidently refers to disputes of a civil nature only, such, for example, as may arise between two or more States, or between citizens of different States, or between a State and the citizen of another State, none of which could possibly be supposed to relate to such as are of a criminal nature."

It is to be presumed that the framers of the Constitution did not design by the use of the same identical expression to confer one jurisdiction upon the federal courts as to matters of dispute between States and another jurisdiction as to matters of dispute between cit-

izens of different States. In other words, if the words "controversies between two or more States" do not embrace, under any circumstances, in the one case controversies growing out of contracts or liabilities for the payment of money, the words "controversies between citizens of different States" cannot be fairly construed to embrace any controversies of a pecuniary character; and yet we are surely within the limits when we say that a large majority of the "controversies between citizens of different States" of which the federal courts have from their foundation taken jurisdiction have been controversies arising out of contracts for the payment of money.

But it is urged that it is derogatory to the dignity of a State to have it impleaded in any court upon any contract, or obligation or promise which a State may have made.

Whether this be true or not is immaterial, if it be true (and as to this there can be no question) that the States, by coming into the Union and accepting the Constitution of the United States as their supreme law, have agreed to submit their controversies to the supreme tribunal created by that Constitution and clothed by it with jurisdiction of just such controversies.

And is it any more derogatory to the dignity of a State for it to be impleaded in this impartial tribunal in a controversy involving such important and far-reaching questions of public obligation and of public right as are presented in this cause than it would be to be impleaded in this court upon the question as to whether one State had encroached upon the territorial limits of another State; or as to whether it was improperly allowing its citizens to pollute the waters flowing through its territory and by the territory of another State, or that it was in violation of the rights of a neighboring State, diverting, dissipating, and absorbing streams of water rising in one State and preventing their natural flow in the territory of another State; or that it was doing any one of the things for which States have been impleaded under jurisdiction recognized and approved by this Court?

We are unable to see that there is any surrender of the dignity of a State in that it submits, or, if recalcitrant, is compelled to submit, its controversies to the adjudication of a tribunal of its own creation and selection for the settlement of any question of controversy involving property rights, or any other direct interests of a State in its corporate capacity, or of the people of a State represented by the government of the State.

It is urged that a State cannot be sued without her consent; but, as has been repeatedly decided by this court, all of the States have, in most solemn form, given their consent to the jurisdiction of this court over all civil controversies which may arise between them.

A careful review of all the decisions of this court which throw light upon this subject, we think, justifies us in the view that this is no longer a debatable question.

The word "controversy" as used in this section of the Constitution has been repeatedly passed upon and intepreted by this court. Not only has its meaning been fixed by this court in approving the jurisdiction taken by the circuit courts of the United States of hundreds of controversies of a pecuniary character "between citizens of different States," but it has been repeatedly given a similar significance and interpretation, and the jurisdiction of this court sustained in respect to controversies to which States were parties and in respect to controversies to which the United States has been a party, as to which the definition and limitation of the jurisdiction conferred by the Constitution is defined by precisely the same word, "*controversies.*" And so we say that, if this court has jurisdiction of any controversies arising out of demands for money, or obligations for the payment of money, between States, then neither this court nor any other federal court could have jurisdiction of any such pecuniary "controversy between citizens of different States," or of controversies to which a State is a party, or of a controversy to which the United States is a party, for in each case the jurisdiction is conferred by precisely the same language.

And such we understand to be the doctrine established by the decisions of this court.

The first case in which this question arose was that of *Chisholm, ex'r, vs. Georgia*, 2 Dal., p. 419, in which this court held that the judicial power of the United States and the original jurisdiction of the Supreme Court, as conferred by section 2, article III of the Constitution, embraced a demand for money asserted against a State by a citizen of another State in an ordinary action of assumpsit, and that such a case presented a "controversy" within the meaning of that section of the Constitution.

Mr. Justice Iredell alone dissented, not as to the construction given by the majority of the court to the word "controversy," but as to the decision of the majority of the court in construing section 2 of article III so as to extend the jurisdiction of the federal courts to a pecuniary demand asserted by a citizen of one State against

another State. He held and argued that the language used in the Constitution, taken as a whole and construed in the light of the historical facts which he mentioned, was not designed to give the federal courts jurisdiction of a suit by any *individual* against a sovereign State upon any merely pecuniary demand; but it is an exceedingly significant circumstance that Mr. Justice Iredell was constrained to hold, and he did declare, that—

“The Supreme Court hath, therefore, first, *exclusive jurisdiction in every controversy of a civil nature; 1st. Between two or more States.* 2nd. Between a State and a foreign State. 3rd. Where a suit or proceeding is depending against ambassadors, other public ministers, or their domestics, or domestic servants. Second. Original, but not exclusive jurisdiction, 1st, between a State and citizens of other States. 2d. Between a State and foreign citizens or subjects. 3d. Where a suit is brought by ambassadors, or other public ministers. 4th. Where a consul or vice-consul, is a party.”

Id., p. 431.

Had that suit, like this, been a suit between two States; had that been a suit by South Carolina *vs.* Georgia, upon a demand for money, there cannot be a doubt but that this court, as then constituted, would have unanimously maintained its jurisdiction. And such is the meaning and effect of the decision of all the Judges.

It may be fairly claimed that the ruling of the majority of the court in *Chisholm, ex'r, vs. Georgia* has been questioned, if not overruled, as to the suability of a State by any private citizen independently of the eleventh amendment, and the opinion of Mr. Justice Iredell in that case affirmed by the opinion of this court, as formulated by Mr. Justice Bradley in *Hans vs. Louisiana*, 134 U. S., p. 1; but it will be seen that Mr. Justice Bradley, in the interesting opinion referred to, affirms and approves the opinion and the views of Mr. Justice Iredell in the *Chisholm* case; and Mr. Justice Iredell, in his opinion so unqualifiedly affirmed, as we have seen, held that this court had jurisdiction “*in every controversy of a civil nature between two or more States,*” though he held that jurisdiction was not conferred upon it of a controversy between an individual plaintiff suing a State upon a pecuniary demand.

There can be no doubt that the decision and reasoning of all the judges in the case of *Chisholm, ex'r, vs. Georgia* confirms every contention made for the plaintiff in this case as to the rightful and necessary jurisdiction of this court over a controversy of the kind

presented here between the Commonwealth of Virginia and the State of West Virginia.

The question of the nature and extent of the jurisdiction conferred upon this court by article III of the Constitution in respect to controversies to which a State is a party, and also as to controversies between two or more States, was exhaustively discussed by Chief Justice Marshall in *Cohens vs. Virginia*, 6 Wheat., pp. 364, 375-440.

In considering the effect of the adoption of the 11th amendment upon that jurisdiction the Chief Justice, at pages 405-6, says:

"This leads to a consideration of the 11th amendment.

"It is in these words: 'The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States, by citizens of another State, or by citizens or subjects of any foreign State.'

"It is a part of our history, that, at the adoption of the Constitution, all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the federal courts formed a very serious objection to that instrument. Suits were instituted; and the court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained this amendment was proposed in Congress, and adopted by the State legislatures. That its motive was not to maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment. It does not comprehend controversies between two or more States, or between a State and a foreign State. The jurisdiction of the court still extends to these cases; and in these a state may still be sued. We must ascribe the amendment, then, to some other cause than the dignity of a State. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a State, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors. *There was not much reason to fear that foreign or sister states would be creditors to any considerable amount, and there was reason to retain the jurisdiction of the court in those cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by States.*"

And at page 378, in defining the jurisdiction of this court in this

class of cases in which its jurisdiction by the terms of the Constitution is determined by the character of the parties, the Chief Justice uses this language, which would seem to be conclusive as applied to this case:

“In the second class, the jurisdiction depends *entirely* on the character of the *parties*. In this are comprehended ‘controversies *between two or more States*, between a State and citizens of another State, and between a State and foreign States, citizens or subjects.’ *If these be the parties, it is entirely unimportant what may be the subject of controversy.* Be it what it may, these parties have a constitutional right to come into the courts of the Union.”

It has been argued that these rulings of the Chief Justice were *obiter dicta*. They were entirely pertinent to the great question which he was considering and had a direct bearing upon it. The question which the court had to review was what was the character of the controversies over which it had jurisdiction under article III of the Constitution, after the adoption of the 11th amendment; and it was necessary in that connection for the court to construe the word “controversy” as used in that article.

The opinion was one of the most lucid and ablest which ever came from the mind of the great Chief Justice. It was evidently well and carefully considered.

Under such circumstances a conclusion which he so deliberately reached and so clearly expressed ought to have the greatest weight.

It may also be justly claimed that the expressions in opinions in two or three later cases, which are claimed to be inconsistent with the views of Chief Justice Marshall, are all of them far more emphatically *obiter* than were his conclusions as above quoted.

It is to be presumed, of course, that the controversies to which the Chief Justice referred were controversies in a judicial sense; that is to say, justiciable controversies; but where has it ever been held by any court anywhere that a controversy arising out of a contract for the payment of money was not *justiciable*?

Since money supplanted barter in the dealings and contracts of mankind, and since courts for the adjudication of civil controversies have been established, a great part of the disputes which have grown out of the contracts of mankind have been controversies about the payment of money. They have not been “solvable” by the courts but they are generally more really “solvable,” for principles of justice and right and more adequate relief can usually be admin-

istered in respect to them than in respect to some other descriptions of controversy which have been held to be justiciable by this court. For instance, the prevention of the flow of polluted water from the State under whose authority it has been contaminated, along the borders of another State, the health of whose inhabitants is prejudiced by the flow of such polluted water by their shores, as in *Missouri vs. Illinois*, 180 U. S., p. 208; or the prevention of the undue retarding and diminution of the natural flow of rivers by the State in which they have their source into the State through which they have their natural exit, as in *Kansas vs. Colorado*, 185 U. S., p. 125; or, indeed, the establishment of a disputed boundary line between co-terminous States, as in *Rhode Island vs. Massachusetts*, and a number of later cases where this court has taken jurisdiction of such controversies.

In *Missouri vs. Illinois*, 180 U. S., 240, Mr. Justice Shiras, after reviewing at great length the cases decided under the constitutional provision giving this court original jurisdiction in controversies between two States, says:

“The cases cited show that such jurisdiction has been exercised in cases involving boundaries and jurisdiction over lands and their inhabitants, and in cases *directly affecting the property, rights and interests of a State*. But such cases manifestly do not cover the entire field in which such controversies may arise, and for which the Constitution has provided a remedy; and it would be objectionable, and indeed, impossible, for the court to anticipate by definition what controversies can and what cannot be brought within the original jurisdiction of this court.”

This question has been directly passed upon by this court and its jurisdiction over controversies arising upon pecuniary demands has been sustained in—

Georgia vs. Brailsford, 2 Del., p. 402;

Texas vs. White, 7 Wal., p. 700;

Florida vs. Anderson, 91 U. S., p. 667;

Alabama vs. Burr et als., 115 U. S., p. 413;

and even more emphatically and conclusively in—

United States vs. North Carolina, 136 U. S., p. 211;

United States vs. Texas, 143 U. S., p. 621; and

United States vs. Michigan, 190 U. S., pp. 379, 396, 406.

The three last cases would seem to be entirely decisive of the question.

The very language under which this court took jurisdiction of these cases, all involving pecuniary demands of the United States against the several defendant States, is used in the Constitution to confer jurisdiction upon this court of controversies between States; and if that language in the one case gave this court jurisdiction of a controversy arising out of, or asserted upon, a pecuniary demand, by a logical and inevitable consequence it gives this court jurisdiction of a similar controversy between States.

It may possibly be contended that the question of jurisdiction was not raised in *United States vs. North Carolina*, 136 U. S., p. 211, but such contention would be idle, because this court, and no other federal court, according to the uniform decisions of this court, can, even by consent of parties, exercise jurisdiction in any case in which such jurisdiction has not been conferred upon it by the Constitution or by valid act of Congress.

This question arose in *United States vs. Texas*, 143 U. S., p. 621, *supra*, where, at page 642, this court, through Mr. Justice Harlan delivering its opinion, said:

"The cases in this court show that the framers of the Constitution did provide, by that instrument, for the judicial determination of *all cases in law and equity between two or more States*, including those involving questions of boundary. Did they omit to provide for the judicial determination of controversies arising between the United States and one or more of the States of the Union? This question is in effect answered by *United States v. North Carolina*, 136 U. S., 211. That was an action of debt brought in this court by the United States against the State of North Carolina, upon certain bonds issued by that State. The State appeared, the case was determined here upon its merits, and judgment was rendered for the State. *It is true that no question was made as to the jurisdiction of this court, and nothing was therefore said in the opinion upon that subject. But it did not escape the attention of the court, and the judgment would not have been rendered except upon the theory that this Court has original jurisdiction of a suit by the United States against a State.*"

And it unquestionably arose and was passed upon in *United vs. Michigan*, 190 U. S., pp. 379, 396, 406, which was a suit for the recovery of money, in which this court, Mr. Justice Peckham delivering its unanimous opinion, at page 396, held:

"By its bill the United States invokes the original jurisdiction of this court for the purpose of determining a controversy existing between it and the State of Michigan. This court has jurisdiction of such a controversy, although it is not literally between two States, the United States being a party on the one side and a State on the other. This was decided in *United States v. Texas*, 143 U. S., 621, 642; 36 L. Ed., 285, 292; 12 Sup. Ct. Rep., 488."

Such was also the effect of the decision of the majority of the court in *South Dakota vs. North Carolina*, 192 U. S., p. 268; and there is nothing in the dissenting opinion of the minority of the court in that case inconsistent with the views for which we contend.

Again, we say that it seems to us the question is no longer a debatable one in this court.

(b) Is there anything in the contention that this court cannot hear and determine the questions presented in this case because it has, as is alleged, no power to render or enforce any final judgment or decree therein?

Let us see, first, what is the precise character of this suit and what is the relief sought, a total misconception of which must have occasioned the assignment of the ground of demurrer now being considered.

The main and real object of the suit is a settlement with West Virginia, and to this end a determination and adjudication by this court of the amount due by that State to Virginia, upon the state of facts set forth in the bill.

West Virginia having refused to have any accounting, or even to negotiate with Virginia upon the subject, it became necessary to invoke the equitable jurisdiction of this court in order that it might ascertain, determine, and adjudge the proportion of the debt of the original State which it would be equitable for West Virginia to pay.

The Commonwealth of Virginia would be loth to believe that any State of the American Union would disregard or disobey any decree of this, the tribunal selected and empowered by all of the States as the final arbiter of all civil controversies which may arise between them, and did not consider it necessary in any such case, or proper under the circumstances of this case, to insert in her bill a special prayer asking this court to summarily enforce its decree against West Virginia.

She cherishes the hope that there would never be any occasion to

ask the court to award any execution or take any action for the purpose of enforcing such judgment as it shall render.

If such occasion should ever arise, it will be for the court to then decide by what process or further action it would proceed to execute its decree.

It will be time enough when the proper accounts have been taken, and the balance ascertained, and the sovereign State against whom such balance may be found has repudiated the liability and refused to pay such balance, to consider and decide whether the power resides in this court and the means are at its hand to enforce the payment of the amount so found to be due.

It is enough for present purposes to know that all the States in the Union have, by the Constitution of their general Government, covenanted and agreed in the most solemn form that "the judicial power shall extend to controversies between two or more States," and that "in all those cases in which a State shall be a party the Supreme Court shall have original jurisdiction."

"The Constitution of the United States, with all the powers conferred by it on the General Government and surrendered by the States, was the voluntary act of the people of the several States deliberately done, for their own protection and safety against injustice from one another."

Ableman vs. Booth, 21 How., p. 521.

"Some tribunal exercising such authority, is essential to prevent an appeal to the sword and a dissolution of the Government."

2 Story on Constitution, sec. 1681.

The Supreme Court hath exclusive jurisdiction in every controversy of a civil nature between two or more States.

Chisholm vs. Georgia, 2 Dall., 2d ed., p. 430.

These cases hold that questions of boundary, territorial right, and property rights of all kinds are proper for this jurisdiction.

2 Tucker's Constitution, p. 784.

Indeed it may be needless to consider at all the question of whether, when a decree shall be made ascertaining the amount due by West Virginia, on a full adjustment and accounting between the two States, how such an amount can be obtained from the debtor State. We may accept as sound and true the statement made by Mr. Webster in his letter to Baring Brothers (*Webster's Works*, vol. 6, p.

539), that "the security for State loans is the plighted faith of the State as a political community, resting on the same basis as other contracts with established governments; that is to say, the good faith of the government making the loan, and its ability to fulfill engagements." We may admit that this is the only sanction and security on which an individual who is a public creditor may rely; that this arises on the creation of the debt and continues so long as the debt exists. We recognize that no sovereign State, of whatever form of government, can clothe an individual or another State with power to seize by force upon its treasury and appropriate its resources without regard to the needs, policies, or will of the debtor State.

Every day judgments are rendered by this court against the United States for money demands on appeals from the Court of Claims; but nowhere is power given to this court to award execution of *fiere facias* against the United States. Awards are made by high tribunals and commissioners to whose arbitrament claims for money against empires, kingdoms, and republics have been submitted, but never has power been given to these courts to enforce by judicial process or physical force the payment or satisfaction of the amounts which they may ascertain to be due.

Only by appropriation, regularly made by the legislative branch of the Government, is provision ever made for the payment of claims, whether ascertained by judgment, award, or other legal form. To that branch of the Government alone may we look for the fulfillment of "the good faith of the Government."

We here invoke the exercise of a long established ground of equitable jurisdiction when, on the case stated in the bill, we ask that an accounting be had, and that such other and further relief be granted as the nature of the case may require and in equity may be meet.

It is true that in the case of *Gordon vs. United States* the Supreme Court declined to take jurisdiction of the case on appeal from the final action of the Court of Claims, on the ground that no power had been conferred upon the court to enforce its judgment, Chief Justice Taney in the opinion saying:

"nor can Congress authorize or require this court to express an opinion on a case where its judicial power could not be exercised and where its judgment would not be final and conclusive on the rights of the parties, and process of execution awarded to carry it into effect.

"The award of execution is a part, and an essential part,

of every judgment passed by a court exercising judicial power. It is no judgment, in the legal sense of the term, without it. Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy," &c.

Gordon vs. United States (Appendix), 117 U. S., p. 697.

(Although a grave doubt exists as to the authenticity and accuracy of this alleged opinion.)

This language was used in considering and deciding a question of jurisdiction of the Court of Claims where the judicial power of the United States had not been conferred on it by Congress. It is not applicable to the question presented here, which is not as to the jurisdiction of the court, but as to its power to enforce its writ of execution against a State. The question here is not as to the power of the arm to strike, but as to the immunity of the object from wounds.

Whether property or funds of West Virginia within the jurisdiction of this court, other than property used distinctly for governmental purposes, would be liable to seizure, levy, garnishment, or sale in execution of or for the purpose of coercing compliance with any such decree in a question which we trust will never arise; for we are persuaded that any decree which this court shall render will be accepted by both parties as final and binding and will be respected and obeyed. But if a decree shall be rendered against West Virginia, and that State shall fail or refuse to respect it and to comply with its terms, it will be time enough then for this court to decide what farther action shall be taken in the enforcement of its decree.

The supreme court of Louisiana, in the case of *Carter vs. State*, 42 La. Annual, 930, in an opinion delivered by Judge Fenner, has shown why, from the character of the party, a writ of *fiery facias* should not be awarded, and cannot be enforced against a State.

"Legislative acts authorizing individuals to sue the State upon claims which the Legislature, for any cause, does not see fit to recognize and pay, have been of common occurrence in this and in other States. Their purpose and effect, as commonly understood, are undoubtedly nothing more than to refer to the judiciary the settlement of the question of law and fact involved in the claims, and the determination, in the form of a judgment, of the rights of the parties. It is implied, as a matter of course, that the legislative power,

after making such a reference, will accept and abide by the judicial determination, will recognize the judgment rendered as final and conclusive, and will, in due and ordinary course, make provision for the satisfaction thereof.

"That such was the interpretation of his remedy, adopted by the plaintiff himself, is evinced by his applications to successive General Assemblies for an appropriation to satisfy his judgment.

"But to assume that, by consenting to be sued, the Legislature intended to abdicate its constitutional function of controlling and administering the public funds and property and of appropriating them to such lawful purposes as it may deem best, and to delegate to the judicial department the power of seizing such property and applying it to the payment of a particular debt, would be, beyond measure, rash and unjustifiable. No such intention is expressed in the act or can be fairly implied from its terms; and we consider it beyond question that no such ever entered into the mind of any member of the legislative body. The incidents and appurtenances of ordinary jurisdiction have no application to a case like this. Undoubtedly jurisdiction granted to render judgments between parties subject to judicial power and control implies power to execute such judgments. But the sovereign is not subject to judicial power and control except just so far as it has consented thereto; the moment the limit of that consent is reached the judiciary must instantly halt. Satisfied as we are that the Legislature has not consented and did not intend to consent to the execution of this judgment by writ of *fiery facias*, we are bound to deny such remedy.

"Counsel asks, of what use is the power to render judgment against the State, if the court is powerless to execute the judgment? That question was anticipated by Mr. Hamilton in the discussion of the Constitution of the United States before its final adoption. 'To what purpose,' he asked, 'would it be to authorize suits against sovereign States for the debts they owe? How could recoveries be enforced? It is evident that it could not be done without waging war against the contracting State.' Federalist, No. 81. He never dreamed that authorizing suit against a State would imply the right to issue *fiery facias* on the judgment.

"Puffendorff says: 'And if the prince gives the subject leave to enter an action against him in his own courts, the action itself proceeds rather upon natural equity than on municipal laws. For the end of the action is not to *compel* the prince to observe the contract, but to *persuade* him.'

"In England claims against the Crown might be prosecuted before certain courts, in the form of petitions of right, with the consent of the King, but it was held by Lord Mans-

field that 'if there were a recovery against the Crown, application must be made to Parliament, and it would come under the head of supplies for the year.' "

Macbeth *vs. Haldimand*, 1 Durn. & East., 172.

We have examined all the authorities quoted by counsel, and find none of them to support his contention. We are quite certain that no precedent exists sustaining the issuance of a *fieri facias* on a judgment against a sovereign State in her own courts, though rendered with her own consent.

The only recourse for satisfaction is by application to the Legislature, with whom the judgment should surely have great *persuasive force*, but none *compulsive*.

In *United States vs. North Carolina*, 136 U. S., p. 211, *supra*, this court took jurisdiction of a suit brought by the United States against that State for money due upon bonds held by the United States.

In *United States vs. Michigan*, 190 U. S., pp. 377-406, already referred to, this court again took jurisdiction of a suit against Michigan for the recovery of money. At the conclusion of its opinion, at page 406, this court unanimously decided that—

"There must be a judgment overruling the demurrer, but as the defendant may desire to set up facts which it might claim would be a defense to the complainant's bill, we grant leave to the defendant to answer up to the first day of the next term of this court. *In case it refuses to plead further, the judgment will be in favor of the United States for an accounting, and for the payment of the sum found due thereon.*"

Every writ, process and remedy which would be available for the enforcement of such a judgment, or for the decree prayed for by the plaintiff in *United States vs. North Carolina*, 136 U. S., p. 211, *supra*, would be available for the enforcement of a decree in this case adjudicating the amount of West Virginia's equitable contributive share of the ante-bellum debt of Virginia.

If such decree in *United States vs. North Carolina*, or the judgment directed in *United States vs. Michigan*, could not be summarily or effectively enforced, then it may be that a final decree in this case cannot be so enforced.

But it is equally true, and it is a truth which should conclusively dispose of this ground relied upon in the demurrer, that if the inability of this court to award any execution or frame any writ

which would enable the United States to enforce any such decree or judgment against North Carolina or against Michigan did not defeat the jurisdiction of this court in the suits against those States, a similar inability to summarily enforce a decree in this case against West Virginia by execution, levy and sale cannot defeat the jurisdiction of this court in this suit against that State for a settlement, ascertainment, and adjudication of the state of the accounts between the two States.

It is impossible by any conceivable process of right reasoning to apply any principle to the case at bar which would defeat the jurisdiction of this court, upon the ground here discussed, which would not have deprived this court of its jurisdiction in each of the cases just considered.

And so upon this alleged ground of demurrer we conclude that the bill presents a controversy between the plaintiff and defendant States justiciable and solvable in this court, and that the jurisdiction of the court will not be defeated because it may be that the plaintiff may not be able to collect from the defendant, or this court may be unable to compel the defendant to actually pay such sum as the court may adjudge and decree to be due by the defendant.

(3)

To the third ground assigned in defendant's demurrer, namely,

"That it appears by said bill that the plaintiff herein sues as trustee for the benefit of a number of individuals who are the alleged owners of certain certificatets in the said bill set forth and described,"

our reply is that this assignment is founded upon mistake. It is not true that Virginia sues as trustee for the individuals mentioned or for any other persons. She sues in her own name and for her own benefit, in vindication of her own rights and for her own protection.

It is true that if the relief which she seeks is accorded her it will not only enure to her benefit, but necessarily to th benefit of all of the creditors of the undivided State, as well those who have deposited their unsatisfied bonds in her keeping as those who have never funded the bonds of the original State held by them; as well also those whose bonds and certificates are represented by the "depositing committee," who made the contract which is copied in the bill, as those whose bonds and certificates have not been so deposited.

It is true that the amount of the unfunded bonds and of said certificates which are not represented by said "depositing committee" is comparatively small, but they aggregate over a million dollars. Whether their holdings are large or small, this suit must necessarily enure to their benefit, as it must also to the benefit of all of the unsatisfied creditors of Virginia, for the reason that Virginia cannot obtain the exoneration to which she is entitled unless West Virginia's equitable share of liability upon every bond and obligation of the undivided State shall be ascertained and adjudicated.

Indeed, a little reflection will show it to be true, that the amount and extent of West Virginia's liability in respect to any one of the original bonds representing Virginia's ante-bellum debt could not be ascertained without at the same time by the same token ascertaining her aliquot liability as to all of the others of those bonds.

It will be seen at once that this is true, for under the Wheeling ordinance and the first constitution of West Virginia, framed and adopted in pursuance and effectuation of that ordinance, and under the contract thereby created between Virginia and West Virginia it would be impossible to determine what part of any particular bond West Virginia is legally and equitably bound to pay without first ascertaining what is the equitable proportion of the entire ante-bellum indebtedness of the undivided State.

And so no suit could be brought by Virginia against West Virginia; and, indeed, if an individual could legally institute and prosecute such a suit, no suit could be brought by any individual holder of a single one or any larger number of the bonds of the original State against West Virginia for a settlement and be prosecuted to a finality without an ascertainment of West Virginia's share of the entire indebtedness.

But Virginia's status in reference to this suit and her relation to the bonds deposited with her and the relief she seeks, and to which the bill shows her to be entitled in respect to those bonds and to the whole case, have been already fully discussed in the foregoing part of this brief and they need not be further treated here.

It is true that in the prayer for general relief Virginia asks that—

"all proper accounts be taken to determine and ascertain the balance due from the State of West Virginia to your oratrix in her own right and as trustee as aforesaid."

But this, we submit, does not convert the suit which she has

brought in her own name and right into a suit by her *as trustee*; for, in the settlement of the accounts which this court may hereafter direct to be taken between Virginia and West Virginia it will be convenient, if not necessary, in the ascertainment of West Virginia's contributive proportion of the original public debt of the Commonwealth of Virginia to show the amounts due to Virginia in her own right and also as trustee. Indeed, the prayer of the bill for the ascertainment of the amount due by West Virginia upon the bonds held by Virginia as trustee might be omitted without impairing the character and effect of the bill.

The paramount and controlling equity which Virginia asserts and relies on, is her right to have a settlement and accounting between West Virginia and herself of all the matters growing out of the partition of her territory and the adjustment and determination of the respective rights and liabilities of the two States. This, we submit, is Virginia's right, and it is not affected by any questions that may be suggested as to the disposition she may make of whatever amount may be decreed by this court to be due to her.

It may be true that she has pledged in advance the full amount of any such recovery to the payment ratably of certain of her old debts, or even that she has made a declaration of trust as to such amount in favor of those creditors; but those are matters which cannot be considered on this demurrer. They are in nowise involved in the ground of equitable jurisdiction invoked by this bill. Virginia's right to compel contributions from West Virginia to the satisfaction of a common liability cannot be impaired or at all affected by the fact that Virginia has declared her purpose to apply the amount recovered to the payment of her debts.

They are matters which may, and doubtless will, be laid before the master to whom the settlement and statement of the account is intrusted, or they may have to be considered and passed on by this court, in the directions it may give to the master for his guidance in the execution of the order of reference; but they form no proper subject for consideration or action by the court at this stage of the case. The only question presented for decision now is, Has Virginia shown by her bill a proper case for the relief asked, of an accounting and for contribution from West Virginia?

(4)

The fourth assignment of grounds of demurrer is so general in

its terms that it is difficult to make to it a specific reply. It is as follows:

“That the said bill does not state facts sufficient to entitle the Commonwealth of Virginia to the relief prayed for, or to any relief, either in her own right or as trustee for the owners of the certificates therein set forth and described.”

This contention rests largely upon the same grounds upon which the second assignment is based, and the reply to it is very much the same, which is a conclusive answer to that assignment, and the importance of the case will justify some iteration in stating this reply.

The case stated in the bill must on this demurrer be taken to be true as to the facts charged. Among the facts charged are the following, viz:

1. That the restored State of Virginia, in convention assembled, did, on the 20th day of August, 1861, adopt an ordinance:

“To provide for the formation of a new State out of the portion of the territory of this State.”

That section 9 of that ordinance was as follows, viz:

“9. The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, &c., as above quoted.”

2. That on the 31st of December, 1862, the Congress of the United States, by act, provided that the new State, thus formed in pursuance of said ordinance, should be admitted into the Union by the name of West Virginia.

3. That on the 20th of June, 1863, the State of West Virginia was accordingly admitted.

4. That by act of the General Assembly of the restored State of Virginia, passed February 3, 1863, all property—real, personal, and mixed—owned by Virginia, but situated within the proposed boundaries of West Virginia, was granted and transferred to West Virginia upon the condition, viz, that—

“The State of West Virginia shall duly account for the same in the settlement hereafter to be made with this State.”
&c.

5. That under and by virtue of said act there was actually received and enjoyed by the State of West Virginia property of the Commonwealth of Virginia amounting in value to several millions of dollars.

6. That by act of the General Assembly of the restored State of Virginia, passed February 4, 1863, there was appropriated to the State of West Virginia from the public moneys of Virginia the sum of \$150,000; and there was further appropriated "*all moneys not otherwise appropriated then*" and that may come into the treasury up to the time when the State of West Virginia shall become one of the United States.

7. That by section 8 of article 8 of the constitution framed and adopted by the State of West Virginia, and under and in accordance with and by reason of which she was admitted into the Union of States, it was provided:

"8. An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this State and the legislature shall ascertain the same as soon as may be practicable—and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

8. That the legislature of West Virginia never ascertained the amount of West Virginia's "equitable proportion" of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861; that the State of West Virginia has never accounted for the property of the Commonwealth of Virginia which was turned over to and received by her, amounting in value to several millions of dollars; that the State of West Virginia has failed and refused through a period of forty years, and in the face of repeated solicitations on the part of Virginia, to enter upon any settlement of the accounts between herself and Virginia, but has oftentimes and but recently, through one or the other of the two houses of her legislature, declared that she would not recognize any liability whatever as resting upon her to the Commonwealth of Virginia.

Wherefore, and by reason of the matters of fact aptly charged in the bill, it is manifest that a controversy is presented between the Commonwealth of Virginia and the State of West Virginia to

which the judicial power of the United States extends and as to which this court has original jurisdiction.

West Virginia obtained the consent of the restored State of Virginia to the erection upon the territory of Virginia of this new State, and she procured the aid of the Senators and Representatives of Virginia in Congress in having her invested with sovereignty and admitted into the Union upon the express terms of the "Wheeling ordinance," which bound her to "*take upon herself a just proportion of the public debt of the Commonwealth of Virginia.*"

West Virginia obtained admission into the Union of States on an express undertaking in her constitution that—

"An equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, 1861, shall be assumed by this State."

West Virginia received and applied to her own uses property belonging to the Commonwealth of Virginia to the amount in value of several millions of dollars, on the express condition that she would "*duly account for the same in the settlement hereafter to be made with this State.*"

Hence it is evident that the "demand" referred to in this branch of the first ground of demurrer is not, as there assumed, "a simple demand for money," but it is a prayer that the *accounting*, so solemnly promised, may now be had, under the direction of this court.

The bill presents a state of facts from which it appears that the case is one for the exercise of the equitable jurisdiction of account upon some of the most important grounds upon which that jurisdiction can be invoked, according to the authorities and precedents.

(a) There have been in the first place complicated transactions running back to the creation of this new State, and back of that for about thirty years, embracing numerous loans made by the original State of Virginia and a large number of expenditures of the money thus borrowed in the construction of internal improvements outside and inside the territory now constituting West Virginia.

Any such settlement would necessitate, first, an ascertainment of the amount of the public debt of Virginia as of January 1, 1861, a matter which in itself would require the services of a skillful and painstaking accountant.

There would also have to be an ascertainment of a great multitude of items of expenditure made by the old State within the

limits of what is now West Virginia, and of a vast number of payments made in the shape of taxes by the people living in that territory towards the support of the State government, in each case from the date of the inception of the State debt down to the 1st of January, 1861.

There would have to be, moreover, a determination of what was the proportion of the general expenses of the State government equitably chargeable against the counties and cities now constituting West Virginia during the same period. All of this, and more than is indicated here, would have to be ascertained in order to furnish the data upon which to ascertain the just proportion of the debt of the Commonwealth which West Virginia can be required or expected to pay upon the basis prescribed in the Wheeling ordinance.

These complicated statements, and the accounting necessary to evolve from them accurately, fairly, and justly the share of the common indebtedness which can be equitably assigned to West Virginia, alone would furnish an amply sufficient justification for a resort to a court of equity for an account.

But, in addition to this ground, there are others which even more emphatically call for the equitable relief to which the bill shows the plaintiff to be entitled.

(a) Prominent among these is the plaintiff's right to contribution. The basis of this right has been already fully stated in this brief, and in the bill. (See paragraph xvi, p. 16 of the bill.)

As to the right to invoke the aid of a court of equity to establish the right to contribution, see

1 Madd Chy., 233, star page 234.

Ex parte Gifford, 6 Ves., p. 808.

Lawson vs. Wright, 1 Cox, p. 276.

Collyer on Partnership, secs. 2-3, ch. 8.

1 Story's Eq., sec. 504.

Wright vs. Hunter, 5 Ves., p. 792.

Wills vs. Huobell's Adm'r, 2 Johns. Chy. R., 401.

(b) Another ground for equitable jurisdiction recognized by all of the authorities upon equitable jurisprudence and practice is the plaintiff's right to exoneration upon the facts stated in the bill and already fully stated in the former part of this brief.

(c) Another ground for equitable relief shown by the bill is the accounting necessary to ascertain what money and property, stocks, and other assets of Virginia were transferred to and received by

West Virginia under the acts of the General Assembly of Virginia of February 3 and 4, 1863. (See pp. 4, 5, and 6, paragraphs viii and ix of the bill.)

(d) Another ground for the exercise of equitable jurisdiction shown by the bill is the avoidance of a multiplicity of suits. Virginia sustains, as appears from the bill, various associated relations in respect to West Virginia, all affecting the property and pecuniary rights of the two States, all growing out of the formation of the new State, closely related to the partition of the territory and property and the apportionment of the common indebtedness of the undivided State, and all necessarily factors to be considered in making any satisfactory or final settlement between the two States.

First, Virginia holds obligations and evidences of indebtedness of the undivided State great in number and large in aggregate amount, paid off or retired by her, doubtless, at different times and under variant circumstances, but each of them giving her a claim against West Virginia to be reimbursed to the extent of West Virginia's liability therefor.

Second. She is entitled to have West Virginia make proper remuneration to her or give her proper credit for the money and property of Virginia which West Virginia received under the acts of February 3 and 4, 1863.

Third. She is entitled to exoneration to the extent of West Virginia's equitable liability upon the various transactions set forth in the bill, hereinbefore fully stated.

It is not only proper, but it is alike West Virginia's and Virginia's right and to their interest, to have the settlement of all of these associated claims and transactions made in one suit, instead of the parties being harassed by a number of suits for the equitable adjustment of matters which can be far more satisfactorily, intelligently, and fairly considered and adjudicated in one suit.

(5.)

The fifth ground assigned in the amended demurrer—

“That it does not appear by said bill that the Attorney-General has ever been authorized to institute and prosecute this suit in the name of the Commonwealth of Virginia in her own right, but only as trustee for the use and benefit of the owners of certain certificates mentioned in the act of

March 6, 1900, which is referred to and made part of said bill."

is refuted by the bill. In support of this statement it is only necessary to refer to the following parts of the bill.

The act of the General Assembly of Virginia approved March 6, 1900, printed at pages 41-42 of the bill, entitled

"An act to provide for the settlement with West Virginia of the proportion of the public debt of the original State of Virginia proper to be borne by West Virginia, and for the due protection of the Commonwealth in the premises."

in the second section thereof authorized the Virginia Debt Commission, appointed under the joint resolution of March 6, 1894, upon certain conditions mentioned in that section,

"by and with the advice and approval of the Attorney-General of Virginia to take such action and institute such proceedings on behalf of the State as may in the judgment of the commission and the Attorney-General be needful and proper to protect the interest of the State, and bring about and carry into effect a settlement as aforesaid."

The bill avers (paragraph xx, p. 11) that—

"This suit has been instituted at the request and direction of said commission, and in strict conformity with the provisions of said act of March 6, 1900."

The exhibits filed with and as part of the bill, and particularly the report made by said commission to the General Assembly of Virginia on the 9th of January, 1906, Exhibit No. 8, pages 43-50 of the bill, prove the truth of this allegation, though its truth, of course cannot be questioned by the demurrant.

(6.)

The sixth ground of demurrer assigned in the amended demurrer is:

"That the said bill does not sufficiently and definitely set forth the claims and demands relied upon, but the allegations thereof are so indefinitely (*sic*) and uncertain that no proper answer can be made thereto."

The bill, with as much exactness and particularity as is possible under the circumstances, sets forth with much detail the facts upon which the plaintiff claims to be entitled to relief.

It is as full and precise in asserting the demands which it asserts against the defendant as it is reasonably practicable to make those allegations without first having had the accounting with the defendant and which is the primary relief for which the bill prays.

If Virginia could, without such an accounting with West Virginia, state with definiteness just what is the sum West Virginia should pay to Virginia, an action of assumpsit might have sufficed; but no remedy at law could give her the relief to which she is entitled by way of exoneration, nor is there any adequate remedy at law by which the complicated and more or less intricate accounts can be so digested and stated upon equitable principles as to reach a result which will be just to the parties.

(7.)

The seventh assignment made by defendant's amended demurrer is:

"That the allegations in the said bill are not sufficient to entitle the plaintiff therein, either in her own right or as trustee, to an account or to a discovery from this defendant."

This has already been answered in the answers made to other alleged objections to the bill. The plaintiff's right to an account is unquestionable upon any one of the several grounds already discussed; and a plaintiff is entitled to discovery in any case in which any right to equitable relief exists, and the defendant is in possession of any information, documents, or records which may throw any light upon the questions at issue or facilitate a just solution of those questions.

(8.)

The eighth and last ground of demurrer assigned is:

"That the said bill does not contain any prayer for a judgment or decree or any other final relief against this defendant."

This objection is possibly even more technical than some of the others presented in the demurrers.

It was not necessary under the English chancery practice, adopted

by this court in 1792 for the guidance and direction of suitors and practitioners therein, to have any prayer at all for special relief.

Under the prayer for general relief the plaintiff could obtain all such relief as he was found by the chancellor to be entitled to upon the state of facts alleged in his bill and established by his proofs.

“The old bills in chancery did not contain any special statement of relief, but only what is called the prayer for general relief.” * * *

Adams' Eq., m. p. 309.

Mitford's Pleading, m. p. 39..

Cook vs. Martin, 2 Atk., p. 141.

Under later practice in England, the prayer for general relief was still held to be sufficient, though it became the universal practice to insert a special prayer, and to conclude with the prayer for general relief.

Adams' Eq., m. p. 309.

But there are prayers in the bill for special relief, namely,

“that the said State of West Virginia may be made a party defendant to this bill, and required to answer the same, that all proper accounts may be taken to determine and ascertain the balance due from the State of West Virginia to your oratrix, in her own right and as trustee as aforesaid; that the principles upon which such accounting shall be had may be ascertained and declared, and a true and proper settlement made of the matters and things above recited and set forth; that such accounting be had and settlement made under the supervision and direction of this court by such auditor or master as may by the court be selected and empowered to that end, and that proper and full reports of such accounting and settlement may be made to this court; that the State of West Virginia may be required to produce before such auditor or master, so to be appointed, all such official entries, documents, reports and proceedings as may be among her public records or official files and may tend to show the facts and the true and actual state of accounts growing out of the matters and things above recited and set forth, in order to a full and correct settlement and adjustment of the accounts between the two States; that this court will adjudicate and determine the amount due to your oratrix by the State of West Virginia in the premises;”

These prayers not only ask for the specific relief stated, but that

“the court will adjudicate and determine the amount due to your oratrix by the State of West Virginia.”

An adjudication is a solemn judgment of a court. The word “adjudicate” is defined to mean:

“To determine in the exercise of judicial power; to pronounce judgment in a case” (Anderson’s Diet. of Law).

“Synonymous with adjudge in its strictest sense” (Abbott’s L. Diet.).

“To determine judicially; try and decide; adjudge” (Standard Dictionary).

So a prayer for an adjudication by the court is a prayer for a judgment.

But such a prayer is unnecessary in a bill invoking the chancery jurisdiction of account.

The judgment or decree upon the account when taken and confirmed by the court is a necessary incident to the relief sought:

“for it is implied if not expressed in the decree to account that the balance shall be paid to the party entitled.”

1 Madd Chy. Pr.; title, Account, p. 86.

But where there is a prayer for special relief which does not adequately define *or even inaccurately state* the relief to which the plaintiff is shown upon the case presented to be equitably entitled, such relief as is adequate and appropriate to the case can and should be granted by the court.

I Daniell’s Chy. Pr., ed. 1846, p. 434.

The modern English practice is

“to pray particular relief, though if the particular relief prayed for in the bill cannot be given exactly as prayed, the court will assist the particular prayer under the general prayer; but relief inconsistent with the specific relief prayed cannot be given under the general prayer.”

2 Madd Chy., m. p. 172.

Beaumont vs. Beaumont, 5 Ves., p. 495.

Muckleston and Brown, 6 Ves., p. 52.

The proposition asserted in this eighth assignment is negatived by repeated decisions of this court.

It will be noted that the bill contains prayers for special relief

and also a prayer for "all such other, further and general relief as the nature of the case may require and to equity may seem meet."

In *English vs. Foxhall*, 2 Peters, p. 612, this court declared that—

"There is no doubt but that, under the general prayer, other relief may be granted than that which is particularly prayed. But such relief must be agreeable to the case made by the bill."

And in *Watts and others vs. Waddle and others*, 6 Peters, pp. 389-403, this court said:

"Although there is no specific prayer in the bill to be paid the rents and profits, yet the court think that under the general prayer this relief can be granted. *Under this prayer any relief may be given for which the basis is laid in the bill.*"

And in *Walden, &c., vs. Boley and others*, 14 Peters, pp. 164-5, this court decided that—

"A court of equity cannot act upon a case which is not fairly made by the bill and answer. *But it is not necessary that these should point out in detail the means which the court shall adopt in giving relief.* Under the general prayer of relief, the court will often extend relief beyond the specific prayer, and not exactly in accordance with it."

See also, to same effect—

Boone vs. Chiles, 10 Peters, p. 177.

Stevens vs. Gladding, 17 How., p. 455.

Georgia vs. Stanton, 6 Wall, p. 50.

Texas vs. Hardenburg, 10 Wall., p. 86.

Jones vs. Van Doren, 130 U. S., p. 692.

Hayward vs. Eliot Nat. Bank, 96 U. S., p. 611.

Lockhart vs. Leeds, 195 U. S., pp. 427-437.

In the case cited this court decided that—

"There is nothing in the intricacy of equity pleading that prevents the plaintiff from obtaining the relief under the general prayer, to which he may be entitled upon the facts plainly stated in the bill. There is no reason for denying right to relief, if the plaintiff is otherwise entitled to it, simply because it is asked under the prayer for general relief, and upon a somewhat different theory from that which is advanced under one of the special prayers."

These authorities would seem to unquestionably establish the suf-

iciency of the prayers for relief in the bill, and to effectively dispose of the eighth ground of objection laid in the amended demurrer.

The grounds of objection to the bill alleged in the original demurrer have not been noticed, for the reason that they are all merged in or covered by the amended demurrer.

Upon the whole case presented, it is respectfully submitted that the demurrers should be overruled, and the defendant required to answer the plaintiff's bill.

MARCH, 1907.

WILLIAM A. ANDERSON,

Attorney-General of Virginia.

HOLMES CONRAD,

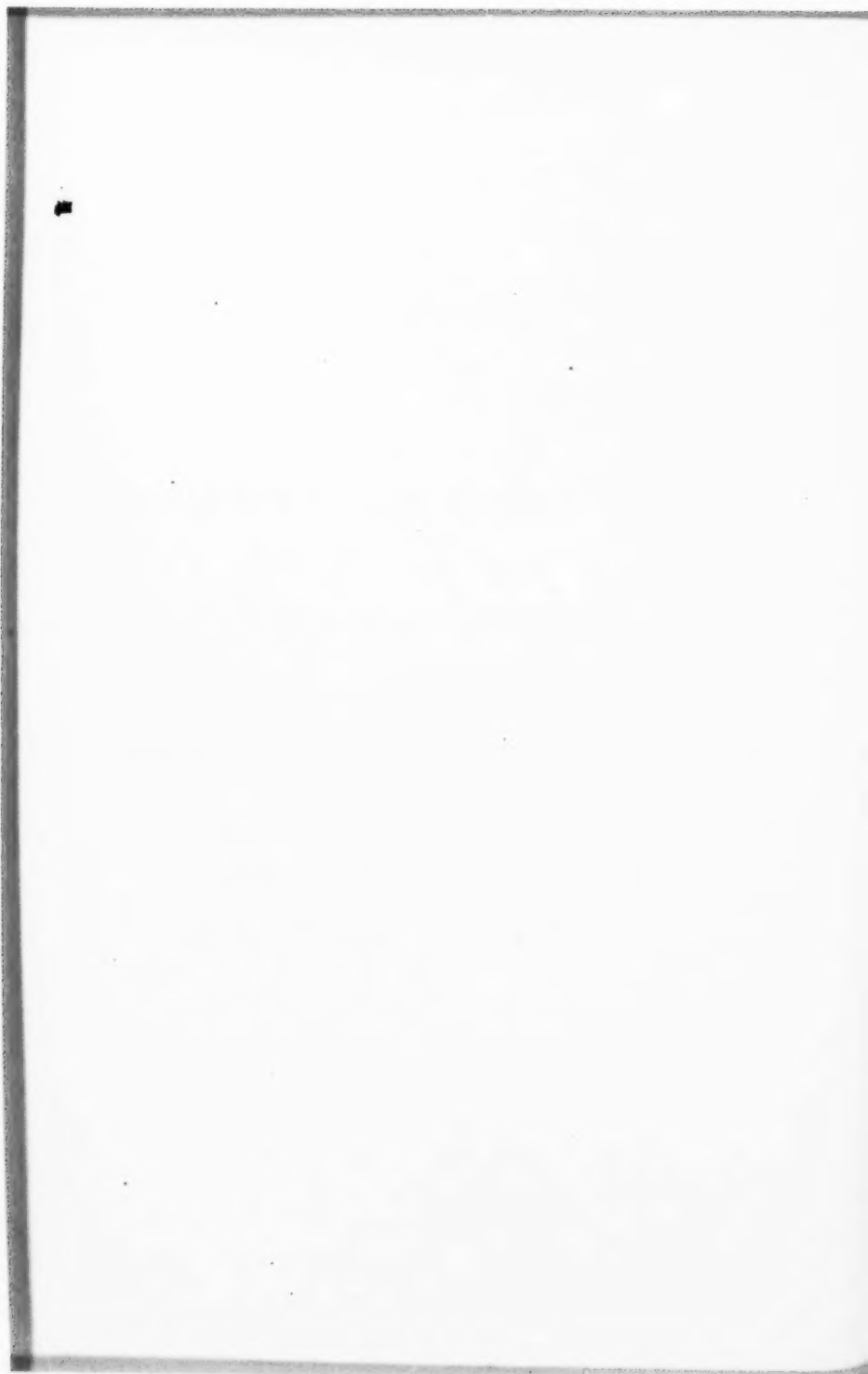
Of Counsel for Virginia.

Supreme Court of the United States.

OCTOBER TERM, 1906.

Argument of Mr. Chas. E. Hogg, for Defendant.

MONDAY, MARCH 11, 1907.



IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

ARGUMENT OF MR. CHAS. E. HOGG, FOR THE DEFEND-
ANT.

MONDAY, MARCH 11, 1907.

MR. HOGG. May your Honors please: This is a suit in equity instituted in this Court by the Commonwealth of Virginia as sole plaintiff against the State of West Virginia as sole defendant.

To put the Court in possession of the essential facts of this case upon which the plaintiff rests its claim for relief, it is sufficient to say, (these facts appearing from the face of the bill and its exhibits, and matters of which the Court will take judicial notice), that in 1820 or 1825 the State of Virginia entered upon a work of internal improvement within its boundaries, having for its object the projection of a canal from James River to the Ohio for the purpose of connecting its seaboard with the western waters; the building of certain railroads projected in the same direction and in certain other directions; the construction of highways and bridges, and certain public buildings. To carry on this work it became necessary to raise funds on the credit of the State of Virginia by means of the sale of bonds, which were made from time to time during the period intervening between 1820 or 1825 and 1861. At that time the indebtedness of Virginia contracted in this way approximated \$30,000,000.

JUSTICE DAY. In 1861?

MR. HOGG. In 1861, the beginning of that year.

During the progress of this work nearly all of the proceeds derived from the sale of these bonds were expended within the present limits of Virginia, very little of those proceeds being expended within the limits of the territory of what is now the State of West Virginia.

In 1861 a convention assembled at Richmond and adopted an ordinance declaring the intention of the State to withdraw from the Union. That ordinance was submitted to popular vote, and it was claimed by the authorities at Richmond that it had been ratified.

The great masses of the people in the territory now composing the State of West Virginia, and other sections of Virginia, did not believe that the State had the right to take steps looking to its withdrawal from the Union, and delegates assembled, representatives from that part of Virginia composing West Virginia, in convention in June, 1861, to take steps to restore the status of the State to its former relations with the General Government. That convention adopted an ordinance having in view the formation, ultimately, of a new state. In that ordinance all of the machinery of state government was provided for, including the various co-ordinate branches of the government, and the legitimate status of Virginia by that convention was restored. Virginia was then recognized by all the Departments of the National Government, and her delegates as representing the people of Virginia in that convention as the State Government of Virginia. That convention in its ordinance provided for the steps to be taken for the creation of a new state out of a part of the territory then lying within the bounds of Virginia west of the Appalachian Range of Mountains. It was also provided in that ordinance for the election of delegates to frame a constitution, in convention to be assembled for the proposed new state. In the ordinance they also provided for the assumption of West Virginia's just proportion of the debt created by Virginia prior to January, 1861, as already mentioned. The language of the ordinance with reference to the debt is as follows:

"The new state shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia, prior to the 1st day of January, 1861, to be ascertained by charging to it all the State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State Government since any part of said debt was contracted, and deducting therefrom the moneys paid into the Treasury of the Commonwealth from the counties included in the said new State during said period."

This is the declaration of Virginia herself, made on the 20th day of August, 1861.

In accordance with the other provisions of this ordinance, the convention to frame the constitution of the proposed new state assembled, the constitution was framed, and in that constitution with reference to this public debt, the following provision was embodied:

"An equitable proportion of the public debt of the Commonwealth of Virginia prior to the 1st day of January, 1861, shall be assumed by this state, and the Legislature shall ascertain the same as soon as may be practicable and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

This constitution was ratified by the people within the territory of the proposed new state in April, 1862; and in May, 1862, the General Assembly of Virginia gave its consent to the formation of West Virginia out of the portion of the territory described in the ordinance and the constitution for the new state. That part of the Act of the General Assembly of Virginia, enacted in May, 1862, and giving its consent to the formation of the new state, reads as follows:

"Be it enacted by the General Assembly, That the consent of the Legislature of Virginia be and the same is hereby given to the formation and erection of the State of West Virginia to include the counties of Hancock, Brooks, * * * according to the boundaries and under the provisions set forth in the constitution for the said State of West Virginia, and the schedule thereto annexed proposed by the convention, which assembled at Wheeling on the 26th day of November, 1861."

Subsequently, in December, 1862, an Act of Congress was passed authorizing the formation of a new state out of a portion of the territory of Virginia as set forth in the ordinance of 1861 and the constitution of 1862; and but for one matter which had not been embodied in the constitution of the new state she would have been admitted into the Union by that Act. Congress, in the Act passed in December, 1862, recites the holding of the convention of August, and the adoption of the ordinance of 1861—recites the fact of the holding of a convention for the framing of the constitution for the proposed new state in 1862; also the consent of Virginia, as evidenced by her act of May, 1862, and admits West Virginia by that Act into the Union with this proviso: That slavery shall be exclud-

ed from its boundaries. And when that was done, proclamation thereof should be made, and thereafter the proposed new state should be admitted into the Union. And on the 20th day of June, 1863, West Virginia, under this compact, composed of these various documents and acts, became a new state of the Union.

Recess until 2:30 P. M.

After Recess. 2:35 P. M.

MR. HOGG. In the convention which adopted the ordinance of August, 1861, when the matter of assuming a portion of the public debt arose, the basis of its adjustment also came up. It was known by Virginia that nearly all of the proceeds derived from the sale of the bonds had been expended within her present limits, and it was also known that the work of internal improvement had not as yet reached the West Virginia line, and that if the new state were formed it would be impossible for Virginia to go on and prosecute the work as a state enterprise after the new state had been severed and a new state government organized. It was also known to the representatives of the people of the proposed new state that if they were to undertake to meet that improvement and complete it that it would have to be done out of their own public resources, or by private enterprise. Therefore, when it became necessary to adopt, in connection with the new state, a just proportion of the public debt, the method of determining that necessarily arose. They therefore decided, and embodied it in the ordinance, that Virginia should be credited with all of the money expended within the limits of the proposed new state, and charged with all the taxes paid into the public Treasury of Virginia from the time of the creation of the debt, less the ordinary expenses of government; and that the difference between those two matters would constitute West Virginia's portion of the public debt. Therefore the basis had been adopted by Virginia herself in her own convention.

JUSTICE HARLAN. You say "Convention of the State of Virginia." What convention do you refer to?

MR. HOGG. The convention which met to restore the status of the state government, and maintain the relationship of Virginia as a state to the National Government after the Ordinance of Secession.

JUSTICE HARLAN. That was known as the Pierpont?

MR. HOGG. Yes, and is so designated in the bill.

When the subject came up in the convention which met to frame the constitution of the new state, there was another question that was open, and that was the tribunal in which the just proportion of the public debt of Virginia should be determined. The basis had already been promulgated, which was acceptable to the new state, and therefore to settle that matter, the convention framing the constitution of the new state declared that the legislature of West Virginia should ascertain the same as soon as might be practicable, and provide for the liquidation by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years. That was satisfactory to Virginia, as evidenced by the Act giving her consent for admission, for the constitution of the new state was before the legislature when the Act was passed, and with that provision in the constitution, Virginia gave her consent. Congress passed the Act giving the consent of the National Government to the creation of the new state, with all of these provisions in the constitution as to the bases upon which, and as to the tribunal by which, this just proportion should be determined.

Now your Honors will perceive that after the creation of the new state, it became obligatory upon her to ascertain that just proportion as soon as was practicable, and in the manner designated by the ordinance. After the restoration of peace between the states, Virginia brought suit in this Court, assailing the integrity of the territorial limits of the new state, claiming certain counties, which were recognized by the new state as being a part of her territory, were not in fact a part of her territory, but really belonged to the old state. Pending that suit, West Virginia, on the basis agreed upon between the two states, could not proceed to act because the determination of her just proportion depended upon whether or not the certain counties in controversy, were actually within the territory. That suit in this Court remained undetermined until the 6th of March, as I now recollect, 1871; and on that day it was determined that West Virginia's territory, as she had claimed it, was intact, and the case was determined in favor of the defendant.

Now then, up to that point of time, neither state, owing to the condition of affairs, could act with reference to this debt. The first expression of Virginia with reference to her public debt was that contained in an Act of her General Assembly approved March 30th, 1871, in which Virginia by her own act proposed to make settlement with her creditors of the old *ante-bellum* debt.

JUSTICE BREWER. After the decision in the case?

MR. HOGG. After the decision of the Supreme Court. She, in that Act, proposed to assume two-thirds of that debt, issue new bonds for it, and to receive to herself in trust, the surrender of the old bonds, the settlement of the other one-third to await a settlement to be thereafter had between West Virginia and Virginia. Accordingly, after this enactment, the creditors of Virginia did avail themselves of the provisions of that Act, and a great deal of the old debt was funded upon that basis.

The next expression of Virginia with reference to her public debt was that contained in an Act of the General Assembly of Virginia approved March 28th, 1879, by which she provided an abatement of the rate of interest and divided her then outstanding indebtedness into two classes, which it is not necessary to mention here in the statement of the facts, but this Act of 1879, proposing the abatement and new terms of settlement of the two-thirds which she had assumed, provides that, "The owners of all classes of bonds mentioned in this Act, who shall exchange their securities for the bonds created under this Act, and who shall not have yet received certificates representing the remaining one-third of their principal and interest, due and payable by the State of West Virginia, shall receive certificates of a like character to those issued under the act of March 30th, 1871, when they make such exchange, and the State of Virginia will negotiate or aid the creditors holding all of such certificates issued, under this Act, or previous acts, in negotiating with the State of West Virginia for an amicable settlement of the claims of such creditors against the State of West Virginia. The acceptance of the said certificates for West Virginia's one-third, issued under this Act, shall be taken and held as a full and absolute release of the State of Virginia from all liability on account of said certificates."

Under these two Acts, the Act of 1871, and that of 1879, nearly, if not quite all, of her old indebtedness created prior to 1861 was funded on the basis prescribed by these enactments, thus relieving her of all liability upon the one-third part of her original *ante-bellum* obligations. So the matter rested until a third expression of the State of Virginia touching her said debt, so far as it related to West Virginia, was made, which was an Act of her legislature approved February 14, 1882.

JUSTICE BREWER. Up to that time was there any adjustment of the one-third?

MR. HOGG. There was no adjustment up to that time of the one-third.

Now, under this Act of 1882, containing an extended preamble setting forth what purports to be an account between the State and her creditors, and showing the aggregate of principal and interest in two distinct totals in separate columns, and declaring the assumption of two-thirds thereof as her equitable portion, fixing the total amount of this equitable portion as of July 1st, 1882, at \$21,035,-377.15, and then provides for the funding of this sum by the issuance of bonds drawing interest at the rate of 3 per cent., Virginia obtained a very considerable reduction of the two-thirds which she had agreed with her creditors to assume by the Acts of 1871 and 1879, better terms for its settlement, and a reduction of the rate of interest.

When she funded her debt again under the Act of 1882, this provision in that Act appears:

"For all balances of the indebtedness, constituting West Virginia's share of the old debt, principal and interest, in the settlement of Virginia's equitable share of the bonds authorized to be exchanged under this Act, the said share having been heretofore determined by the Commonwealth of Virginia, the said Commissioners shall issue certificates, substantially in the following form, viz: No. The Commonwealth of Virginia has this day discharged her equitable share of the (registered or coupon, as the case may be) bond for Dollars, dated day of and No. leaving a balance of dollars, with interest from to be accounted for to the holder of this certificate by the State of West Virginia, without recourse upon this Commonwealth."

And it is then signed by the Second Auditor, and the Treasurer.

Now a further Act of February, 1892, was passed, which bears the following title: "An Act to Provide for the Settlement of the Public Debt of Virginia, not Funded under the Provisions of an Act Entitled An Act to Ascertain and Declare Virginia's Equitable Share of the Debt created before and actually Existing at the time of the Partition of her Territory and Resources, and to Provide for the Issuance of Bonds covering the same, and the regular and prompt payment of the interest thereon, approved February 14, 1882." This Act of 1892 provided for the issuance of \$19,000,000 in bonds in lieu of \$28,000,000 of outstanding obligations of Virginia, not funded under the Act of February 14, 1882, hereinbefore

mentioned, and prescribed the form of the new bonds to be issued under this Act and the coupons thereof. This Act also provides that in taking up these outstanding bonds before issuing new bonds in lieu thereof there shall be deducted, "One-third of the principal and interest of such obligations as were issued prior to the 30th day of March, 1871, and also deducting one-third of the principal and interest of such obligations as are issued under the Act approved the 30th day of March, 1871, as do include West Virginia's portion." This Act then provides that all balances of the debt of Virginia shall be borne by the State of West Virginia, and issues a certificate similar in form and character to that issued under the Act of 1882. By virtue of this act of legislation Virginia made a further reduction of the principal of her debt and received a more favorable rate of interest and better terms as to payment. That was in 1892. About two years after that a joint resolution was adopted by the Legislature of Virginia providing for the adjustment with the State of West Virginia of the proportion of the public debt of the original State of Virginia, proper to be borne by West Virginia, for the application of whatever may be received from West Virginia to the payment of those found to be entitled to the same. This resolution was approved March 6th, 1894, and in its preamble refers to the acts by their titles, passed by the General Assembly of Virginia relating to her debt, concluding the preamble of this resolution as follows: "Whereas, the present State of Virginia has settled and adjusted, to the entire satisfaction of her people and the creditors, the liability assumed by her on account of two-thirds of the debt of the original state." The resolution then creates a commission "Authorized and directed to negotiate with the State of West Virginia a settlement and adjustment of the proportion of the public debt of the original State of Virginia proper to be borne by West Virginia." But in creating this Commission, to which she confided the duty of negotiating a settlement with West Virginia, it is provided: "But said Commission shall in no event enter into any negotiation hereunder except upon the basis that Virginia is bound only for the two-thirds of the debt of the original State which she has already provided for as her equitable proportion thereof. All expenses incurred by said Commission and said Board of Arbitrators, including reasonable compensation of the members thereof, shall be paid out of the proceeds of such settlement or by the holders of said certificates who are the beneficiaries of such settlement, but without subjecting the State to any expense on this account."

Now a further Act was passed by the Virginia Legislature and approved March 6th, 1900, reciting the previous acts of said Legislature relating to the public debt of said State, and also reciting that "Whereas, in each of said Acts provision is made for issuing to the creditors of the original State of Virginia who should accept the new bonds provided for by said several acts, certificates for such proportion of the obligations surrendered by them as was deemed proper to be borne by the State of West Virginia, to-wit: One-third of the amount of said obligations, of which certificates this State holds a large amount, through the agency of the Commissioners of its Sinking Fund and Literary Fund." In accordance with the provisions and requirements of the Act approved March 6, 1900, the Commission entered into an arrangement with the duly authorized representatives of the holders of the deferred certificates issued by Virginia, without recourse upon her and received by her creditors in settlement of one-third of the original debt, whereby this Commission by and with the advice of the Attorney General, was to institute suit in the name of Virginia in this Court, and these deferred certificates issued upon West Virginia, without recourse upon Virginia, should be assembled and placed in the hands of the Commission. The Commission created by the State of Virginia and the Committee representing the holders of the deferred certificates met and entered into an agreement whereby they surrendered to the then Commission all of these deferred certificates representing, as claimed by Virginia, the one-third part of the debt which was to be borne by West Virginia, and in that agreement it was stipulated that Virginia should incur no expense on account of any suit instituted in this Court in her name against West Virginia for the purpose of enforcing payment of these deferred certificates owned by the original holders or assignees of the old debt, and that the bondholders should bear all expenses. After that arrangement had been consummated, suit was brought in this Court, in which the facts as I have stated them essentially appear, and the bill prays for an accounting between the States of Virginia and West Virginia, and also prays that the principles upon which such an accounting shall be had may be ascertained and declared, and that a true and proper statement be made of the matters and things above set forth, such accounting to be had and statement made under the provision and direction of this Court, by such auditor or means as may be by the Court selected, and that proper and full reports of such accounting and settlement may be

made to this Court; and that the State of West Virginia may be required to produce before such Auditor and persons selected, such books and proceedings as may be among her public records which may aid and show the facts and actual state of the accounts growing out of the matters and things above recited and set forth, in order that a full and correct settlement and adjustment of the account between the two states shall be had. And that this Court shall adjudicate and determine the amount due, and so forth.

At the October term of this Court, 1906, a demurrer was filed by the State of West Virginia which was subsequently amended, and in that demurrer was set forth the grounds upon which it is contended that no liability to Virginia or right to maintain this suit appears upon the face of the bill or its exhibits. Without going into detail with reference to the points of argument, I desire to say that this demurrer raises the first proposition in this form: That the State of Virginia has asserted here in this bill a pure money demand, and seeks a personal decree for that amount against the State of West Virginia. Before calling your attention briefly to the reasons why we think this point ought to prevail upon this demurrer, I desire to state that there is also embodied in this bill a claim for these certificates issued by Virginia representing West Virginia's one-third part of the old debt in the hands of the Literary and Sinking Funds of Virginia; and also a claim for property localized within the State of West Virginia consisting of roads, lands, bridges and so forth. And also \$150,000 appropriated by the General Assembly of Virginia in February, 1863, which is also made a part of the demand. It may be insisted that the right to maintain a suit by one state against another for a purely personal demand is not an open question, but we think that this case presents the proposition as to whether this Court can take cognizance of a purely personal claim on the part of a state and assert it against another so as to make this tribunal available for purposes of a controversy of that character. In this particular case there is nothing to make it an equitable case unless it be on the ground of an accounting, and that if a decree were entered in this case it would be unavailing because it could not be enforced. But I do not desire, if your Honors please, to argue that, because I have not the time.

JUSTICE BREWER. The resolution of the Convention was that the West Virginia Legislature should ascertain the amount, and that was postponed until after 1871. Has West Virginia done anything since then?

MR. HOGG. West Virginia has not been able to do anything for this reason, that Virginia undertook to settle it; and began in 1871 upon the basis that she only owed two-thirds, and when she provided a Commission to settle with West Virginia, it was upon the arbitrary basis that West Virginia must assume one-third.

JUSTICE BREWER. She settled with the bondholders. Did she make any proposition of settlement to West Virginia?

MR. HOGG. None whatever, excepting the proposition that the Commission might arrange it, provided it did not undertake to settle upon any basis excepting that West Virginia was liable for the one-third.

Now then the next ground against the exercise of the jurisdiction of the Court in this case to determine the principles upon which this adjustment should be made, is this: That when the ordinance that Virginia adopted in 1861 providing how the accounting should be had, and when the Constitution of West Virginia, to which Virginia assented, and upon which the Act of Congress was predicated, admitting her into the Union, provided that that amount should be ascertained by the Legislature of West Virginia as the body to act, it was a solemn compact entered into between the two states under which that just proportion should be determined; and that no Department of the General Government, no Department of either of the State Governments, could change that compact except by agreement.

JUSTICE WHITE. Your argument is that an agreement was made for the adjustment on a particular basis?

MR. HOGG. That Virginia never did observe and never would observe.

JUSTICE WHITE. Then there was no agreement to compel?

MR. HOGG. That was not the exact position. The exact position was this, that Virginia undertook herself, beginning with 1871 and extending down to 1882, to settle this upon her own terms, and that Virginia, when she proposed to settle with West Virginia, put restrictions upon the Commission authorized to act, fixing the basis at absolutely one-third of the debt, so that West Virginia was precluded from meeting Virginia upon any terms of adjustment, except those which she has prescribed in violation of the compact.

JUSTICE HARLAN. Does West Virginia admit that she owed anything?

MR. HOGG. West Virginia has expressed herself in her Legislature as, on the basis adopted, owing nothing.

JUSTICE HARLAN. Does she admit that she owes anything on any account?

MR. HOGG. West Virginia disclaims any liability to Virginia on any account.

Now then, if your Honors please, another proposition arises in this case, and that is whether this is a controversy between two states within the meaning of Section 2, Article 3, of the Constitution. Your Honors will perceive from the bill and its exhibits that this suit has been brought for a settlement of the deferred certificates issued by Virginia to the bond holders; that these certificates were issued without recourse upon Virginia, and that they were assembled by the owners and their Committee into the hands of the Commission, and that this suit has been brought by Virginia for the benefit of the holders of these certificates; and that if a personal decree were rendered in favor of Virginia, it could not inure to her benefit.

Furthermore, if it be argued that the obligation which West Virginia assumed, and which was a just proportion of the old debt, was really payable to Virginia, when Virginia settled her part of the old debt with the creditors and transferred to them all deferred certificates representing the other third, and was released from all liability on account of it, her interest in this debt, excepting what she had assumed, ceased and determined, and therefore having settled her proportion as declared in her own Legislature, and no more than her proportion, and having disposed of the other third by her own certificates without recourse upon her, that her interests ended and that she could not be heard to prosecute a suit in this Court for relief on account of those certificates, because the Court could grant none.

Furthermore, if it is assumed on the other hand that when the two states were divided the obligation of West Virginia became a joint one with Virginia to the creditors, and Virginia by her own Act settled in entirety for her own proportion, being released by the surrender of the old debt to her, that would release West Virginia unless she had been privy to the arrangement by which that debt was settled.

JUSTICE BREWER. The effect of that adjustment was simply to reduce the amount of indebtedness.

MR. HOGG. The effect of that was then your Honor, as understood by Virginia, that she simply determined by her act what part

Virginia should assume, leaving the one-third unsettled and represented by these deferred certificates which Virginia had issued against West Virginia.

JUSTICE BREWER. Was one-third released also?

MR. HOGG. No, sir, the one-third still stands out.

MR. McCLINTIC. The bonds were cancelled.

MR. HOGG. Yes, they were. The old bonds, when they were surrendered and the certificates issued, were cancelled so that the debt was destroyed; and Virginia is not asserting in this case any claim for contribution, and if she were she could not maintain it, because no court of equity would decree contribution until the plaintiff had made it appear that she had paid more than her just share. Virginia only claims to have paid her just share, and has been released entirely from the one-third which she has allotted to West Virginia, ignoring entirely the compact, saying that the holders must come into this Court through the State of Virginia as the plaintiff and compel West Virginia to account, for what? Not to Virginia; she gets no benefit; she is entirely released. For no person except the owners of these deferred certificates issued by Virginia without recourse upon herself, against West Virginia.

The other claim that is made in the bill is for certain parts of the old debt represented by deferred certificates that were transferred by the State of Virginia to the Commissioners of her Literary and Sinking Funds. These were mere state agencies created for the fiscal purposes of the state, and any bonds or deferred certificates held by them could not be regarded as a debt against Virginia within the meaning of the compact of August, 1861, or of the Constitution of West Virginia of 1862; in other words, as to that part of these bonds and the deferred certificates representing one-third of them in possession of the Commissioners of her Literary and Sinking Funds Virginia had never become a debtor, she still held them by her own fiscal agents, and therefore it constitutes no debt against the State of West Virginia.

Now as to the third claim made by Virginia against West Virginia, that is asserted under an Act of the Legislature of Virginia passed on the 3rd and 4th days of February, 1863, after Congress had given her consent to the creation of West Virginia, and when Virginia ceased to have any absolute control over West Virginia, so far as imposing any additional burdens upon her as a condition of coming into the Union is concerned. This act of February 3rd, 1863,

relates to property localized within the territory of the new state, and declares that she shall account for it upon a settlement between the two states thereafter to be had. Our contention is that when Virginia gave her consent to the formation of the new state, the only obligations which she imposed upon the new state were those stated in the constitution of the new state, the sole ground upon which she gave her assent; and that the fact that she passed subsequently an act of her legislature seeking to make the new state responsible for the property within her limits could not act as a modus to give vitality or force to that act, because it was done without the consent of the new state, and the new state, under well settled principles of law, would be entitled to all the public property localized within her territory; because it will be recollected that Virginia's government at the time she gave her consent to the formation of the new state was already provided with the instrumentalities and means of carrying on the operations of government. She had everything necessary to equip her. The new state according to that contention would not only have to bear her just proportion of the public debt, but it would have to make compensation to Virginia for all public property left within her domain at its fair value, and then assume all the burdens of government in the protection of her citizens and the carrying on of her relations as a state. That cannot be enforced against the new state.

There is another objection to this feature of the bill, your Honors. When Virginia by her act of legislation authorized the institution of this suit in her name against West Virginia, she restricted in the act the matters to which that bill should refer, and that was to determine a just proportion of the public debt to be borne by West Virginia that had been created on the part of the old state prior to January, 1861; and Virginia by her own showing, by the exhibits filed with her bill, in effect restricted her officer of the law instituting this suit to confine it to her demand on the score of the public debt created before the war, the proceeds of which suit, if any obtained, were to inure to the benefit of the holders of the certificates.

Now another objection to these two additional matters, and to the whole suit, is this: If it be conceded that the claim asserted by Virginia with reference to her public debt be one of equitable jurisdiction, it does not admit of argument that the claim for property localized within the boundaries of the new state, and the \$150,000 mentioned in the bill which was used by West Virginia as a part of the personal property pertaining to local institutions in the state,

does not constitute a subject of equity contest. This Court has expressed itself with reference to the principle which is to distinguish an equity cause from a law cause. Wherever the demand is for a simple judgment for money, or wherever it is simply a claim for damages and does not involve any sort of trust or lien or equitable doctrines to be applied, it must be asserted on the law side. The amount of the demand in this case, if Virginia has any claim against West Virginia for this property localized within her territory, would be its value. If she obtained any money pertaining to local institutions in West Virginia, it would be that amount. Therefore, in this case, Virginia has sought to blend in one suit an equitable claim with a legal demand, which would oust this Court of its jurisdiction, whatever the rule may be in many other jurisdictions to the contrary. If your Honors please, in many jurisdictions, where a court takes cognizance of a suit in equity, on one well recognized principle of equity, it will hold it for all purposes. This is not the rule in the federal courts. It is the policy of the Courts of the United States not to permit a party to be deprived of the right of trial by jury by blending a legal cause with an equitable one. And on that score this Court would not have jurisdiction of this case. We therefore contend that this demurrer ought to be sustained; as all the facts which I have recited appear upon the face of the bill and its exhibits, and the matters of which this Court will take judicial notice, the pleading of which is unnecessary; and that this Court will not take jurisdiction to enforce a simple money demand, because it is without power to make it effective.

Secondly, that the parties to this suit, by their compact embodied in the ordinance of 1861 and the constitution of 1862, the Act of the Legislature of Virginia of 1862 and the Act of Congress admitting the state into the Union, have already appointed and provided a tribunal, to-wit, the Legislature of West Virginia, by which this amount shall be determined. The states have already provided the basis upon which it will be determined, and it cannot be changed by judicial action.

In the third place, we contend that the State of Virginia has no such interest in this suit as will authorize her to maintain it; that it is a suit brought in her name for the benefit of holders of the deferred certificates alone. No decree can be pronounced upon this bill that will inure to the benefit of Virginia.

In the next place we contend that these holders are so directly interested in this suit, being represented by the Commission created

by the State of Virginia, and the Committee acting for them, that this Court cannot, as a matter of justice and equity, undertake to determine the amount that West Virginia should be liable for, nor the method by which that is to be arrived at in the absence of these parties so vitally interested; that if the bill were sought to be amended by bringing them upon the record as parties, they would necessarily in the very nature of things occupy the position of the real plaintiffs in the cause, and being individuals, under the Eleventh Amendment to the Constitution, they would not be permitted to do in conjunction with the state as a nominal party that which they would be prohibited from doing as sole plaintiffs, and that they cannot be heard on that ground. And on the further ground, if your Honors please, that this suit, even if it be conceded for the sake of argument that the debt is a proper subject of cognizance on the part of this Court—that the plaintiff has blended with it these legal demands, and they are simply legal demands without doubt; and therefore the jurisdiction of this Court cannot be exercised, and the plaintiff on any of these grounds mentioned cannot maintain this suit.

JUSTICE HARLAN. Suppose the State owns the bonds of another State; really owns them themselves. What would you say as to the jurisdiction of this Court of a suit by one state against another?

MR. HOGG. To enforce their payment?

JUSTICE HARLAN. Suit to get judgment.

MR. HOGG. Your Honors have never decided that question.

JUSTICE HARLAN. It was decided against one ———.

MR. HOGG. That was a proceeding wherein you executed a decree without embarrassment by the officer of your own Court. You did not disturb the state government; did not ask anything from the State government. You simply ordered a sale of personal property, a power which the Court could properly exercise. But I would not like to answer that question because I would do so on a point that I do not think I ought to express myself upon, as it does not necessarily arise in this case. But it is a serious question as to whether it can be enforced; and it is conceded I believe in the briefs of Counsel for the Plaintiff in this case, that there is no power in the judiciary of a state or the National Government that can control the power of taxation by a state for the purpose of obtaining satisfaction of judgment, rendered against a state or the National Govern-

ment; and that the judiciary has only the power to compel tribunals or courts to do that which the Legislature has prescribed they shall do, and which may be done by mandamus. It must be a pure ministerial duty not embodying the exercise of discretion. And that the matter of levying for taxation, and carrying on the various instrumentalities of the government, is a duty exclusively confined to the legislative branch of the government, and with which the judiciary will not interfere.

It is apparent from the bill in this cause, with the exhibits made a part of it, that its decision does not necessarily involve a determination of the question whether this Court may render a judgment or decree in *personam* against a state. No case has ever been before this Court making it necessary to decide this point in order to a rendition of the judgment of the Court. It is clearly apparent that there is no such state of facts set forth in the bill as to bring this cause within the constitutional provision authorizing the maintenance of a suit in this Court by one state against another. The whole tenor of the bill goes upon the theory that Virginia is suing in her own name on behalf of the holders of the deferred certificates issued by her without recourse upon herself, against the State of West Virginia. She is a self-constituted champion in this Court of the rights of those persons who have already released her from any liability to them, and have accepted her promise to institute this suit as a full guarantee of satisfaction of any and all claim which they ever pretended to have against her. That she cannot maintain this attitude in a suit as plaintiff, for the purpose of obtaining substantial relief, has been repeatedly decided by this Court, and to argue the question is unnecessary, as the authorities supporting this position are fully set forth in the written brief filed in the cause, and the principles upon which the decisions rest are familiar to the Court.

It is respectfully submitted that each ground of demurrer assigned by the defendant presents an unanswerable objection to the maintenance of this cause, and that the bill ought to be dismissed by this Court upon demurrer alone, without subjecting the defendant to the expense and delay of further controversy by means of an answer and the taking of proof in support of it. Indeed, the essential propositions of law necessarily arise upon the face of the bill, and the decisions of this Court show that their determination must be in favor of the defendant.

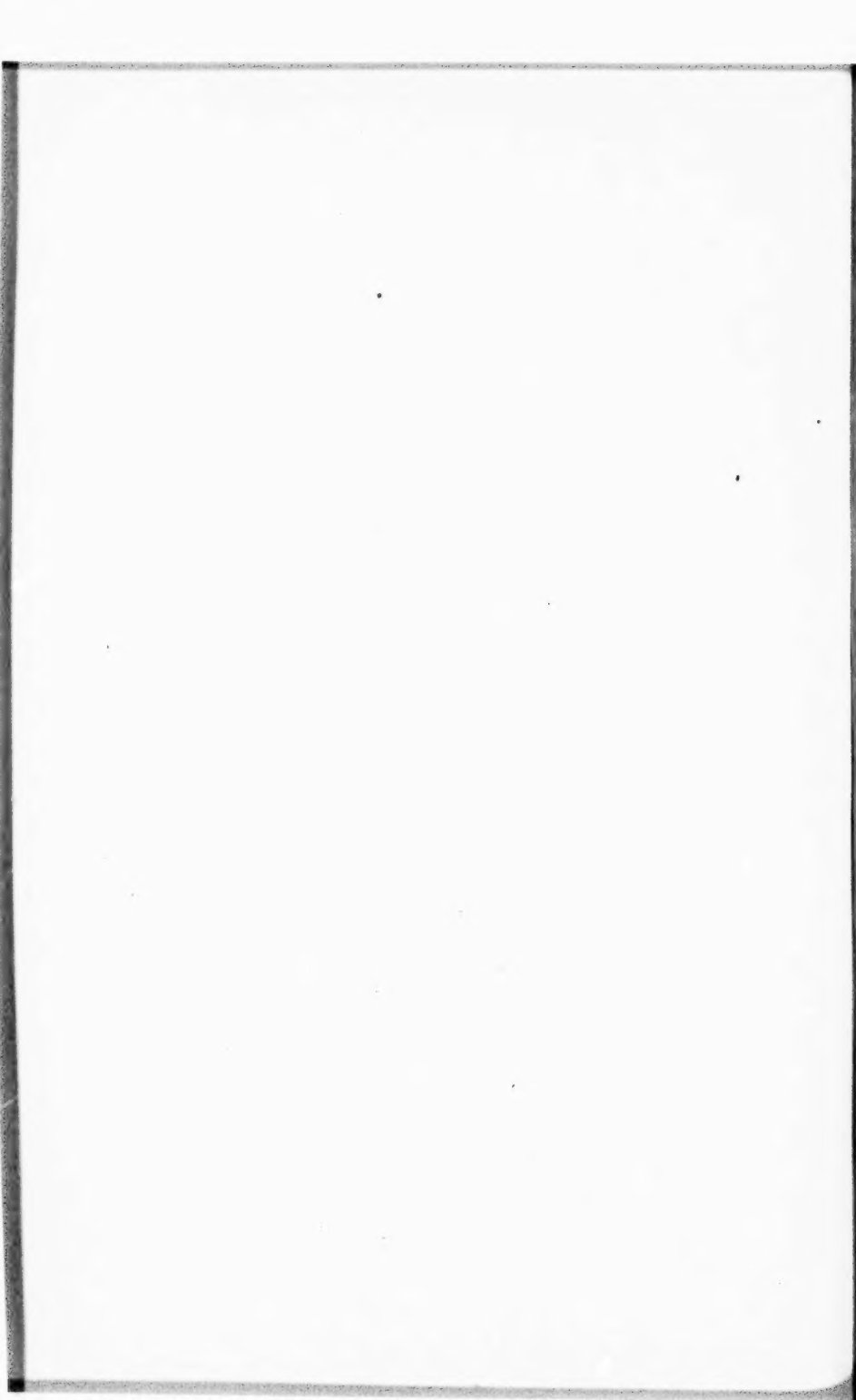


Supreme Court of the United States.

OCTOBER TERM, 1096.

Argument of Mr. Holmes Conrad, for the Plaintiff.

MONDAY, MARCH 11, 1907.



IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

ARGUMENT OF MR. HOLMES CONRAD, FOR THE PLAINTIFF.

MONDAY, MARCH 11, 1907.

MR. CONRAD. If the Court please, The Commonwealth of Virginia comes before this Court and asks its equitable aid in the ascertainment of the contributive share of West Virginia to a common burden which rests now upon both States, which was never a joint debt, but was an obligation which West Virginia inherited by her birth.

We are told in the briefs that the State of Virginia cannot maintain this proceeding, and cannot ask equitable aid here until she has paid off and discharged the entire debt; that one cannot come into a Court of Equity for contribution until that one has paid off the debt upon which he seeks aid.

For the purpose of correcting an error in our brief—the light colored brief—and also asking your attention to the authority, page 18 of the brief for the Commonwealth of Virginia gives a citation to “2nd Spence, Equitable Jurisprudence.” It should be 1st Spence instead of 2nd.

The authority is this: 1 Spence Equitable Jurisdiction of Court of Chancery, page 662. The author is considering those cases in which

the Court of Chancery has enforced obligations arising out of certain relations in which the parties stand to each other, on principles of equity independently of contract, and after referring to the practice in the English Courts, he says:

“It was not necessary to wait till some one was damnified by having paid, or having a claim made against him for the whole; a bill might be filed to settle the amounts due from each individual of a body liable to one common burden, and to compel the payment by each of his share.”

That is, a Court of Equity, in the exercise of its preventive jurisdiction, will not require that a burden of debt, resting upon two or more, shall be absolutely paid off and discharged by one of the number, before it will extend to that one the relief, which this court alone can afford, of fixing the liability upon those on whom it must ultimately be fixed, and doing by one decree, what must otherwise be done by successive suits, that is, apportion the liability among those who must in the end sustain it, and requiring each to contribute the amount which equitably and fairly should be borne by him.

I shall not array before you the cases in which this doctrine has been enforced, or the text writers who have recognized and sustained it by reason and authority, nor shall I stop now to consider the question suggested by Mr. Carlisle, that no such relief can be granted in this cause because our Bill nowhere alleges that Virginia has paid off the entire public debt evidenced by the bonds of the old Commonwealth. I may take occasion later on to call your attention to the fact that so far as Virginia and her creditors are concerned, she has paid all that in equity and good conscience they are entitled to demand of her in a court of Equity. She has issued to them her new bonds for two-thirds of the aggregate of the principal and interest of the old Public Debt, up to January 1861. She has paid the interest, and reduced the principal of that new debt. She has paid off and discharged other liabilities of the old Commonwealth for which West Virginia was liable with her. Meanwhile West Virginia, having received and appropriated to her sole uses public assets of the old Commonwealth to the amount of millions of dollars, has paid nothing on the common debt, and declines to account for the funds she has received and appropriated.

I want to ask your attention now, while I recite briefly, what is alleged in the Bill as to the history of this Public Debt. You have been told by Prof. Hogg, that Virginia created this debt back in the

20's, in providing a system of internal improvements. You are doubtless familiar with the admirable article by Mr. B. R. Curtis published sixty odd years ago, in which he discusses the history of our State debts, the policy that led to their creation, and the ethical questions involved in the judicial ascertainment and enforcement of their liability. But there is a feature involved in this case, that is quite peculiar, but which my learned brother Prof. Hogg did not advert to. It is a matter of public history, clearly established by contemporaneous public records, specifically stated and charged in the Bill, and susceptible of instant proof, it is this: The public debt for which these bonds were issued, was indeed created for the construction of works of internal improvement in Virginia, viz: turnpike roads, canals, railroads, bridges &c., and, as an instrument adapted to the end in view, banks, in which Virginia subscribed for three fifths of the capital stock. Why were these internal improvements entered upon at so great cost? Not for the improvement of Eastern Virginia, but solely for the development and betterment of Western Virginia. It had come down to us as a tradition that the domestic peace of the old Commonwealth had been greatly disturbed, by the dissensions that had marked the first half of the 19th century, between the cis-montane and the trans-montane sections of the State. The published Debates in the Convention of 1829-30 are treasured as priceless monuments of the ability, patriotism and courage that marked the actors on that stage. We have caused the journals of the Senate and House of Delegates of Virginia, during the period in which this debt was being created, and bonds issued therefor, to be examined and the votes for and against the creation of each portion of this debt to be accurately noted, and we are prepared to show this significant result. On each vote taken it appears from the record that the members of both Houses, from the region now constituting West Virginia, advocated, urged, insisted on and voted for the creation of the Debt and the issuance of the bonds, while the members from the remaining parts of the State, in very large part voted against it. The significance of this fact lies in this, that it appears that this public debt to the payment of which we are asking that West Virginia shall contribute, was in fact and in truth created and incurred for the benefit of this very section of Virginia,—for the benefit of these very people who are here as defendants today, resisting this attempt to make them contribute towards the payment of this debt.

This public debt would not have been created, these railroads,

turnpikes and canals would not have been builded, but for the purpose of developing in the Western parts of Virginia those vast stores of mineral and vegetable wealth which were seen and known, though not yet ascertained and developed more than a hundred years ago by the people of Virginia. I might, if it were proper, and my time allowed, mention to you the names of men familiar in the history of Virginia, and in the history of this country, who more than a century ago had explored all this western region, and had then taken up large bodies of these lands, which they held through their own lives and transmitted to their posterity as an heritage of priceless value.

Now, one more feature of this public debt. In 1861—the period arbitrarily fixed—it was a burden resting upon the Commonwealth of Virginia, of which commonwealth the region now known as West Virginia, constituted, not a part—not a section, not even a member, but Virginia herself, just as much as the James River Valley, the Shenandoah Valley, or the city of Richmond the capital of the State. The debt was contracted by the people of West Virginia, through their Delegates and Senators in the General Assembly of the State. The Commonwealth of Virginia was the debtor, the obligor in the bonds, her Governor signed them, and her seal attested them, and this was the governor and this was the Seal of the people who resided then, where they reside now in the territory now called West Virginia. It was then the very Commonwealth of Virginia which issued the bonds. Can the change of name rid them of their self imposed liability? If this be so, suppose that the Shenandoah Valley had been added to West Virginia, and then that the Blue Ridge and eastern piedmont region had been added, and then that all that part of the State north of the James river had been added, until nothing was left but the narrow strip lying south of James river. Could the entire burden of the old public debt be cast upon that narrow and impoverished region? Suppose, indeed that by degrees and, it may be for the very purpose of evading the liability for this just and reasonable debt, the entire State of Virginia had acceded to West Virginia and merged her political and physical existence into the State of West Virginia, would a Court of Equity have lent its aid to the success of such iniquity?

Now one other salient feature, briefly: You have heard much of the “Restored State of Virginia”—the restored state. Let me ask your attention to a bit of history. The people of Virginia assembled in convention in Richmond in 1861.—every county in the State being represented in that convention. A majority of the people of

Virginia were opposed to the exercise of the right of secession—a majority of the members of that convention were opposed to it, but a time came when it was no longer an open question, and they adopted an ordinance that had for its purpose the separation of Virginia from the Union. In the end, it failed. A large majority of the people residing west of the North Mountain—which is the eastern barrier of the present State of West Virginia, and the eastern barrier of Virginia,—were opposed to the action of the Virginia Convention,—they were opposed to secession; All of the members of the Virginia Convention from that region, withdrew from the convention, and returned to their homes. In May or June 1861 a mass meeting, of 25 or 30 men was held in Clarksburg, and they called a convention to meet in Wheeling, that convention in turn, called another convention, the members of which were elected in their respective counties, and it called itself a Convention of the people of Virginia, *Stat magni nominis umbra*. They organized a state government, which they called the “restored State of Virginia”. Now what was their object? From the outset it was to create a new State. They found out that it required the consent of Congress, and, further, that the Constitution forbade the erection of a new State within the territory of an existing State without the consent of such State. “Therefore” they said, “we must first form a new state government of Virginia, here, of our own people, of Western Virginia people, and then, we, as Virginians, will consent to the erection within our territory, of the new State. We will consent that we, man by man, shall convert this territory, foot by foot, into a new State, which we will call West Virginia. So, it came to pass, that the very same men that one day sat in convention as the people of Virginia, on the next day sat in the same hall, as the loyal, people of West Virginia. The same men that one day voted millions of dollars of the public assets of the Commonwealth of Virginia, as a benefaction to the coming state of West Virginia, to be accounted for in a settlement thereafter to be had with Virginia, on the next day sat as the representatives of West Virginia, and with extended hands received the money and property which, as the representatives of Virginia, they had voted to bestow.

Now it is well to bear this in mind, because you have been told already, and it will be directly more earnestly pressed upon you, that Virginia has fully consented to all that has been done. Two large and valuable counties, have since the close of the civil war, been torn from the body of Virginia, on the cruel pretense that she

had consented to her own undoing. When, in truth and in fact the only party who consented, was this same body of people, who on one day sat in convention as the people of Virginia, and the next day sat in convention as the people of West Virginia. "Virginia has really consented" my learned friend says in his brief, has "freely consented to all this" In the name of Heaven, will you pervert and misapply a legal fiction, one that this Court did employ, years ago to sustain its action in wresting the counties of Jefferson and Berkeley from Virginia, and holding that they formed part of West Virginia, in order to relieve West Virginia from its just and reasonable share of the public debt. In the case in 11th Wallace, it was said that the political department of the Government had recognized the action of the restored State of Virginia, as valid and binding, and therefore this court could not review that action.

A little while ago, a demurrer was filed to our Bill, on four grounds, and a month or six weeks ago you were asked to extend the time for hearing this case, in order that what was called, "an amended demurrer" might be filed. We made no objection, and it was done. Now, to day, what is the aspect of the case. The grounds of demurrer are practically abandoned, or ignored, by Mr. Carlisle, and you are asked to sustain the demurrer on a ground not hitherto assigned or indicated, save in the brief of counsel. We are now told that this court cannot entertain jurisdiction of this case, because, forsooth, the parties here, have, more than forty years ago, selected an arbitrator to decide the case.—that forty five years ago, they chose the legislature of the State of West Virginia, and clothed it with power to hear and determine that while the power thus conferred has never been exercised,—indeed has not at any time heretofore been asserted, or claimed to exist, that nevertheless it has never been revoked or surrendered and is therefore a valid, subsisting power to day; that this cause is in fact so far pending before that chosen tribunal as to defeat any jurisdiction in this Court to take cognizance of it. My learned friend, Mr. Carlisle, in his brief, pages 37-38, uses this language in asserting this claim:

"The two States have heretofore, by compact between themselves and with the consent of Congress, as required by the Constitution, designated a tribunal to ascertain and settle West Virginia's share of the debt. This tribunal still exists, and is unquestionably competent to discharge the duties imposed upon it. And, moreover, but most important of all, it is the only tribunal existing, or that can be established, possessing the power to provide for the payment of

West Virginia's share of the debt, when the same has been ascertained, in accordance with the terms of the compact. It cannot be coerced by any judicial or other civil process known to the Constitution and laws of this country. No court can compel it either to adjust the debt or to provide a sinking fund, or impose taxes, issue bonds, or appropriate money."

The argument is that the two States of Virginia and West Virginia, did forty five years ago covenant together that the debtor State alone should be clothed with power to ascertain and determine the fact and the amount of her liability, and that while it was charged with doing that "as soon as may be practicable" yet that it alone was to be the judge of such practicability, and though more than four decades have passed and nothing done, yet are you powerless, despite your broad jurisdiction in such controversies, despite the large powers with which you are clothed, you are impotent to spur this derelict arbitrator to due activity, or reach forth your hand and shear him of the authority which he claims to hold, yet refuses to exercise. That once an arbitrator it is always an arbitrator, immune from all judicial supervision or control. Is not the folly of such contention stamped upon its face. That Virginia, being *sui juris*, did, in fact and in truth, consent that West Virginia should be the sole arbiter of her own liability, did invest her with infallibility, and clothe her with irrevocable authority, and allow her to the end of Time in which to act.

Could anything be more preposterous than the suggestion that even if such a compact had been entered into, and forty five years had elapsed during which period nothing had been done or attempted by the arbitrator, that no presumption would be allowed from such long inaction, that the arbitrator had declined, or had repudiated or abandoned the undertaking. You cannot infer, according to my brother Carlisle's argument, that the chosen arbitrator had never accepted the task or entered upon its duties, that notwithstanding forty five years of unbroken silence, and absolute inaction, you are not warranted in the conclusion that the powers conferred upon the arbitrator have become somewhat impaired, if not altogether extinct.

Let us now consider briefly, what this alleged "compact" is.

It is set up here as the ground of a demurrer to the Bill filed in this cause. Surely it forms no ground of demurrer. It is nowhere asserted or claimed in the Bill. If it could be availed of as a defence

in any form here, it must be as a Plea, of "another suit pending", for its contention is that there is another tribunal, of competent jurisdiction, chosen by the parties hereto, to which this present cause of action has been referred, and before which it is now pending. That solely is no ground for a demurrer. The fact relied on to sustain the objection is not a fact apparent on the Bill. There is no pretense that the Bill sets up any such compact, or submission to arbitration. The defendant, straining after this impracticable defence, reaches out and seizes upon something that is not in the Bill, and seeks to read it into the text of the Bill that thereby he may make for himself a ground of demurrer.

How was the compact formed, and how is it now shown to have had existence?

It is said that the State of West Virginia, by its Constitution, assented to what is known as the "Wheeling Ordinance", which provided that the new State to whose formation it then consented, "should take upon itself a just proportion of the public debt of Virginia existing prior to the first of January 1861". But that "it assented to it with the qualification or addition, that its equitable proportion of the debt should be ascertained by its own legislature as soon as practicable, and that the legislature should provide for its liquidation by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty four years". (Mr. Carlisle's brief, pages 34-35.) It is further stated that the Act of Congress providing for the admission of West Virginia into the Union recited that Virginia had consented to the formation of the new State, by an act of her Legislature passed on the 13th May, 1862, which act provided that certain counties therein named, were admitted "according to their boundaries and under the provisions set forth in the Constitution for the State of West Virginia. The Convention of the Restored State of Virginia, which adopted the Wheeling Ordinance, assembled on 20th August 1861. The Convention which framed the constitution for the State of West Virginia, assembled on November 26, 1861, and this constitution was submitted to the people for adoption on the 3d of May 1862. The Act by which it is said Virginia gave her consent, is alleged to have passed on the 13th May 1862. The Act of Congress under which West Virginia became a State, became a law on the 31st December 1862. West Virginia was admitted into the Union on the 20th June 1863.

Now let us briefly consider these events and the dates on which

they occurred, and see, if we may, how this compact theory will work out.

Virginia, by a Constitutional provision, consents to the formation of the new State within her territory, but on the expressed condition that the new State "should take upon herself a just proportion of the public debt of Virginia &c." The people of Virginia in convention assembled, three months later, frame a scheme of a constitution for the proposed new State, and they, in such scheme of a constitution, assented to Virginia's plan, but, with a radical qualification thereof. Assuming for the moment that West Virginia was then an organic entity, speaking through her organic law, we have a plan proposed by one sovereign, and assented to conditionally, by another sovereign. Assented to only as radically qualified and amended. Has Virginia at any time ever accepted to such qualification and amendment? It must be admitted that such acceptance could be made and manifested only through and by the same organ that had originally proposed the plan; that is, a Convention of the people of Virginia. It is not pretended that any Convention of Virginia has ever agreed or assented to the qualification or condition annexed by West Virginia. How then has Virginia accepted? Through her Legislature, and by the Act of May 13, 1862. That is the Legislature of Virginia has by its action, repealed, annulled and set aside this provision of her Constitution. Further; if need exists, or propriety allows that we go any further. This act of the Virginia Legislature of May 10, 1862, which was in defiance of her Constitution, and by which it is said Virginia assented to the West Virginia Constitution, was enacted more than a year before the State of West Virginia was created. Cases are cited by Mr. Carlisle to show that the terms of an instrument framed as a Constitution of a State not yet created and endowed with political organs and existence, become valid and binding upon the State out of whose territory such new State is formed, after Congress has consented to the erection of the new State, but the conditions in those cases, differ widely from those which control here. Here, the new State embraced, substantially the whole of the territory of the old State, and all of the people of the old State. Here the people who consented to give up their territory to the new State, were themselves the people of the new State to whom such territory was given. They were both the donors and the donees, and beside them there were no others. It is but trifling with the truth and mocking our own reason to talk of the people of Virginia consenting, or having any hand or voice in this matter. The

people of Virginia, the real and only people of Virginia resided east of the North mountains, and they knew—as all honest and true men knew, that Virginia had her seat of government in the city of Richmond, that there were her flag and her seal and symbols of her sovereign authority, and that this tragic farce that was being enacted west of those mountains, was being carried on under the protection of the war then raging, and that its sole reliance was the abuse of the power by those in whose hands, for a season, the powers of the general government had then passed. I deny that the Legislature of Virginia had the lawful power to assent to or to accept the qualifications which the West Virginia convention had attached to the plan proposed by the Constitution of Virginia. I deny further that the Act of May 13, 1862 had any validity whatever, so far as is disclosed by the public records to which I have had access. I am aware that this Court relied on that Act in its opinion and judgment in the case of *Virginia vs. West Virginia*, 11 Wallace. . . . but I have ever believed that had that case been prepared by certain Virginia lawyers, and had come before this Court at a more propitious period, the decision would have been in accordance with the views of the dissenting Justices.

The public records show that the Regular Session of the Legislature adjourned *sine die*, on the 13th February, 1862. The Act of May 13, 1862, could then have been enacted only by the Legislature in Extra Session. The Constitution of the State provided that the Legislature could assemble in Extra Session, only on the call by proclamation of the Governor. I have examined the Journals of the Senate and House at this session, and I nowhere find any reference to any call by proclamation or otherwise of the Governor. I have tried to learn by diligent and searching enquiry, and I cannot ascertain from any quarter that this Extra Session was legally and properly convened.

The fact of this Act of May 13, 1862, is alleged only by and in the demurrer, so that no opportunity has been allowed us to deny that allegation and put the matter of this alleged Act in issue.

MR. CARLISLE. If that act is invalid West Virginia constitutes no part of the Union.

MR. CONRAD. As my friend, Brother Hogg, said “there are a great many delicate questions that you may propound to me, but which I can answer properly, only out of Court, for it might be very unsafe or imprudent for me to answer here. I am required

now to meet the question of the validity of West Virginia. A child born through a Caesarian operation is as valid a child as one that comes into the world in the usual and ordinary way. As to West Virginia's genesis, and the legitimacy of her birth, you perhaps had better—

Make no deep scrutiny
Into her mutiny
Rash and undutiful.

MR. JUSTICE HARLAN. What was the lawful state of Virginia?

MR. CONRAD. The first public act of my life, was to vote in 1861 against secession but I was a Confederate soldier, thank God, and I recognized as the lawful State of Virginia, that one in whose service I was engaged, and which I thought was a part of the Union.

MR. JUSTICE HARLAN. Part of the United States?

MR. CONRAD. Yes; and represented in Congress, while it was there.

I say this compact that is relied upon now, should not be considered, because it is properly no part of the Demurrer. Not only is it not assigned as one of the grounds of the demurrer, but it depends for its very existence upon a matter of fact which is not alleged in the Bill, and which we are warranted in denying ever had validity and legal effect, viz., the Act of May 13, 1862. Now let us pass rapidly on. Taking up the four grounds of demurrer, as they have been assigned and set out, I venture to say that the Bill cannot be held to be insufficient in law on either of the grounds assigned. There is but one special prayer in this Bill. There is but one ground on which this Bill prays relief. There is but one ground for equitable relief on which we have invoked the aid of this Court, and that is that you ascertain here the just and reasonable contributive share of West Virginia, of this common burden of the old Public Debt of the Commonwealth of Virginia. That is all; and now because it appears that while West Virginia shares with Virginia this common liability it also appears that West Virginia has received a large portion—amounting in value to many millions of dollars, of the public assets of Virginia, has received and applied them to her own exclusive uses and enjoyment, therefore accounts must be taken. To what may be ascertained to be West Virginia's share of the

debt, there should be added so much of the public assets appropriated by West Virginia, as exceeds her proper interest therein. Such accounting must be had, and in the taking of such accounts many questions must arise, and it is manifest that every element that enters into these separate grounds of demurrer, is really only but a matter of account that will have to be taken into consideration and dealt with by the Master to whom this cause may be referred for an accounting.

Let us look at some of the grounds briefly. The first one is because of misjoinder of parties plaintiff. In *Bank of United States vs. Osborn*, Chief Justice Marshall said that the only way by which to determine whether a State was a party to the record, was to inspect the record and see if it was there as a party. Try this objection by this simple test. Inspect this record. See who, and how many are the parties plaintiff whose names appear in the Bill. The Commonwealth of Virginia, sole and simple in her own right; in no other capacity or character. She alone files this bill, and she asks against the sole defendant, West Virginia, that this relief be accorded her. But it is said that while she files the bill in that way, yet she prays relief as a trustee. My brother, Professor Hogg, attempted to read the prayer for relief; but he began too low down on the page and missed that part where Virginia does pray that in her own right and as trustee this account may be stated.

What does she mean by that? That requires a very brief reference again to the history of this case. In 1871 the Legislature of Virginia, having waited in vain for some proffer from West Virginia, having been discouraged by the rejection of the proffers that she made, by West Virginia to come into a friendly adjustment and settlement—in 1871 Virginia issued a call to her creditors, her bondholders, all that would come in, and then she took this debt that existed there, evidenced by her long outstanding bonds, and she added six per cent interest to the principal of that debt up to the date 1871; and she says, "This is my debt." She might have claimed an abatement on account of war by which her revenues were depleted. She might have said that "during the period of war and reconstruction I owe no interest." But she did not. She added six per cent interest to the principal, and said, "I owe all that. I want to pay it." She says, "I can get no estimate from West Virginia of what her share is; but looking at her territory, looking at her wealth, it is reasonable that at least one-third of this debt should belong to her. I have no power to fix it upon her. It is only my estimate—an in-

telligent estimate, a fair and honest estimate; but it is not contractual with West Virginia. It does not bind her." So she said to these creditors, "Come in now and surrender your bonds, and I will give you my new bonds for two-thirds of this aggregate of principal and interest. I will give you my new bonds at six per cent interest, and as far as two-thirds of this debt is concerned, while I regard *it* as paid, what shall we say as to the other third?"

Let me ask your Honors to turn for a moment to the act of 1871.

MR. JUSTICE DAY: What is the date of that?

MR. CONRAD: It is printed in the bill. Look now at the bottom of page 15 of this bill, section 3 of the act. Permit me to read it:

"Upon the surrender of the old and the acceptance of the new bond for two-thirds of the amount due as provided in the last preceding section, there shall be issued to the owner or owners, for the other one-third of the amount due upon the old bond, stock or certificate of indebtedness so surrendered, a certificate bearing the same date as the new bond, setting forth the amount of the bond which is not funded as provided in the last preceding section, and that payment of said amount with interest thereon at the rate prescribed in the bond surrendered, will be provided for in accordance with such settlement as shall hereafter be had between the States of Virginia and West Virginia in regard to the public debt of the State of Virginia existing at the time of this dismemberment."

and now note:

"And that the State of Virginia holds said bonds, so far as unfunded, in trust for the holder or his assignees."

My friend, Professor Hogg, tells you that Virginia wiped out this debt; that now she is maintaining this bill for strangers, lending her name to the suit for them. What does she do? She says to these people, "Give me your bond for a thousand dollars, the old bond of Virginia that you hold, for \$666.66. I give you my new bond with six per cent interest. For the remaining \$333.33 I will hold your old bond in trust for you. You have surrendered it—you, the bondholders; you, the creditor, you have put your evidence of debt back into the hands of your debtor. At law it would be a presumption of payment, but to repel that presumption I declare to you expressly by law that I hold that bond *in trust for you* to the extent of that one-third."

Now what will happen? Suppose this fails, and suppose we get nothing from West Virginia? The owner of the bond comes and says, "You are a trustee. You hold a bond as trustee for me to the amount of one-third of the face value of the bond. I demand it from you." Virginia, as trustee, would have to surrender this bond back into the hands of the holders from whom she received it, and he would hold it as an abiding claim against her until it was paid. So I would have you understand, despite the statements that have been made here, that Virginia is a trustee only to this extent. The bond could not be cut into three pieces and two-thirds of it held by Virginia and a third of it given to the creditor. The only way that Virginia could do was to say, "While this physical bond is surrendered into my hands, it is not surrendered for cancellation it is not surrendered in evidence of its satisfaction and payment. Two-thirds of it is discharged, but as to one-third, I hold this bond in trust for you."

MR. JUSTICE HOLMES. What do the words, "So far as unfunded" mean? That is not material, is it?

MR. CONRAD. I will explain in a moment. They used that word "funded" because they took the principal and interest and made a new fund of it, and treated it as a new capital, and made a bond for two-thirds of that new capital and gave that bond to the creditors, and took up the old bond from them.

MR. JUSTICE HOLMES. Then it means the total bonds to the extent of about one-third of their value, or something like that, does it not?

MR. CONRAD. It appears it does, as the bonds now stand; as the result of it, yes. These bonds are in the hands of Virginia now, held by her Treasurer.

MR. JUSTICE HOLMES. If I may put my question in a little different way, it does not mean a certain portion of the bonds selected out of a larger number, but a certain portion of all the bonds?

MR. CONRAD. Yes; You are right about it. It means that one-third of each bond is held by Virginia in trust for the owner of that bond, and this little certificate that my friends have talked so much about, both orally and in their brief, is nothing more than a memorandum. It is not an evidence of debt. In the Act of 1879 Virginia expressly says "the acceptance of this certificate shall not be taken or construed as imposing any liability of debt upon me."

What she meant by that was, "I am not going to have two evidences of the same debt outstanding, bonds and certificates. I want it understood that this certificate is nothing in the world but a memorandum of the declaration of trust, the trust upon which I hold one-third of this bond for you". That is what it meant. It has had the effect of a ware house receipt. It is not carried on the stock lists. It has no intrinsic value. It is not an evidence of indebtedness. It is just like a warehouse receipt that one may sell. A creditor receives one of these certificates and examines it, and asks What is it? and is told "Virginia acknowledges by this Certificate that she holds your bond, surrendered by you. Two thirds of it is satisfied and extinguished by her new bond for two thirds of the amount, and the remaining one third remains a subsisting debt of Virginia to you, evidenced by the bond now in her hands, and which she will hold in trust for you, to the extent of such one third of its amount.

MR. JUSTICE WHITE. Do you construe that this was not an assent to the creditors that they would discharge the debt of one third, and look for recovery to West Virginia.

MR. CONRAD. I think not. I was a member of that Legislature and I did not then, or since, understand that to be the construction which it was intended to bear.

MR. CARLISLE. I contend otherwise.

MR. JUSTICE WHITE. Your idea then is, then, that the State of Virginia meant that the holder of these bonds would say to the State of Virginia "Nothing has been done with this trust. I gave up one third of what you owed me and put in your hands the evidence of the debt. I want my bond back against you, because I have not been paid by the State of (West) Virginia, although it was in honor bound to pay it"

MR. CONRAD. Yes; not only in honor bound, but legally bound, because according to her expressed declaration she said "I hold this bond in trust for you to the extent of one third." Let me answer that further. There is no contractual relation between Virginia and West Virginia. None between West Virginia and these bond holders. They could not sue her as West Va. land passes by descent to two heirs, free from liens, but charged with the ancestors debts. This is not a joint debt of the heirs. It is a common debt. There is no liability upon them except to the extent of assets descended, but to the extent of the estate inherited by them they remain liable.

What are the general creditors to do? If the heirs have come in and taken possession of the land that has descended, they might be

held, but could not be held on a bill at the suit of the creditors more than to the extent of the assets descended; but there is no contractual liability. So it was with Virginia. This was a congenital liability. I would liken it to what one member of the bench would recognize as original sin, but in the preparation of our brief my colleagues made me strike it out, because he said there might be some members of the bench who did not believe in original sin. But that is just the likeness. That is just where West Virginia stands, and sometimes her attitude has induced me to suspect that she regards it as original sin. [Laughter.]

This is the first time that I have heard an open, explicit, undisguised repudiation of her debts. Heretofore, through the mouths of her governors, she has come forward and never denied it. She has come forward with alluring and illusory proffers and overtures of settlement; but when we approached her she receded and receded, until like the Cheshire Cat in Alice in Wonderland, there was nothing left of her but the grin. [Laughter.]

I say that when they talked about there being a misjoinder of parties there is no foundation. The bill itself repels it. When they talk about there being a misjoinder of the causes of complaint, what are they? I beg your attention to this. They come in and say, "You are suing us here for a contribution to this debt." Then you show that the State of Virginia, this "restored State," turned over to us millions of dollars worth of property, in the last paroxysm of maternal solicitude before this child was born. They gave millions and millions of dollars, and these gentlemen say you cannot unite those two things in the same bill. A and B are in partnership, involving millions of money and long transactions, and A goes to the coffers of the firm and takes out all the money, and B files a bill for an accounting, and in the cross bill he says, "A, my partner, the defendant, has appropriated all the available assets;" and A comes in with a demurrer on the ground of a misjoinder of the cause of action, saying, "I am perfectly willing to settle the partnership account, but it is unkind of you to call on me for the assets of the firm that I have appropriated."

Here were millions of dollars' worth of property that Virginia might have taken and applied to the payment of her public debt; \$600,000 worth of bank stock, property of all descriptions, running up into millions, that Virginia could have taken and converted into money and applied to this debt. West Virginia has taken that property. She holds it now, and when we come and ask that she

come into a settlement in order that it may be ascertained and determined what is her contributive share of a common burden she says, "You must not call upon me to account for these state assets that were turned over to me by Virginia because that is a misjoinder of causes of complaint." But further than that I have not the breath left to go into it much now, but in the bill you will find it plainly stated that when the restored Government of Virginia turned over \$150,000, turned over all the property belonging to Virginia within the limits of the state, she added this: "To be accounted for in the settlement hereafter to be had between the two states."

To each one of these acts where money was appropriated by the "restored government" that express condition was annexed: "I will give it to you, but it is to be accounted for in the settlement hereafter to be had between the two States;" and mark you, please, that was after the alleged compact. This was after the alleged compact that took place May 13, 1862. But here in 1863, not once nor twice, but many times, does this "restored State" of Virginia, standing upon the ragged edge of her own dissolution, seeing death right before her—she, in contemplation of her instant extinction, gathered up all the available property of Virginia that was within her reach and turned it over to the Treasury of a State that had not yet been born!

Now they say that "While we will come into a settlement of account, we do not think you have got the right to embrace in your bill praying for that settlement, the public assets that were turned over to us and received by us, and which are at this moment in the Treasury of West Virginia." I want your Honors, please, when you come to construe this Act of the West Virginia Constitutional Convention that calls upon the Legislature of West Virginia to ascertain the amount of the debt and pay it, to decide whether that really means, by any just, fair, and reasonable construction, that they intended to clothe the legislature of the debtor State with the judicial power of hearing and determining that question of liability.

When was this done? When was this debtor empowered to act? "As soon as practicable." In my early professional life a bond was sent to me, payable "when convenient." When convenient—I did ask my father for advice about it, but as usual he told me to find it out and work it out for myself. With the aid of a court I did. The court held that a bond payable "when convenient" was payable within a reasonable time, and construed it to mean payable on demand, and it was paid. Here is an obligation that is to be fulfilled

when it may be practicable. Who is the judge of the practicability? My learned and distinguished opponent here says that there is no power on this earth that is able to determine that matter and exclude this arbitrator from the exercise of his function; that you cannot say that "as soon as may be practicable" means within a reasonable time, and that a reasonable time has long since passed, and that this alleged arbitration is *functus officio*.

CONCLUDING ARGUMENT OF MR. HOLMES CONRAD.

TUESDAY, MARCH 12, 1907.

MR. CONRAD. If the Court please, at the hour of adjournment yesterday I was about to call the attention of the Court to a statement that had been made by Professor Hogg in his oral argument, and it is stated also in the briefs of counsel at great length; and that was that the State of Virginia had no interest in this litigation; that the creditor had absolved her from liability, and that this, if anything, was but a suit prosecuted here in the interest of persons who are strangers to Virginia now, but who were holders of evidences of her indebtedness. I called your attention yesterday to a passage in the act of 1871, known as the first funding act, by which it was provided that these bonds of Virginia, surrendered by the holders and held by Virginia, were held by her in trust for the owners of the bonds, and I stated that if this attempt at a settlement failed, which was the trust upon which Virginia took them, that those owners of bonds could come forward and demand the restoration of them from Virginia and hold them as subsisting evidences of her indebtedness.

Let me ask your Honors now to look at the certificate that was issued, on page 47, at the bottom of page 47 and on page 48. This is the certificate that was issued by Virginia as a memorandum or token or declaration of the trust upon which she held those bonds:

"Treasurer's Office, Richmond, Va.

"This is to certify that there is due to _____ heirs, executors, administrators, or assigns, _____ Dollars, being one-third of bond surrendered under the provisions of an Act approved March 30, 1871, entitled 'An Act to provide for the funding and payment of the public debt,' namely, Bond No. _____, with interest, amounting to _____, payment of said one-third with interest thereon

at the rate of six per cent. per annum will be provided for in accordance with such settlement as shall hereafter be had between the States of Virginia and West Virginia in regard to the public debt of the State of Virginia existing at the time of its dismemberment, and the State of Virginia holds said bonds so far as unfunded in trust for the holder hereof or his assigns."

Now the State of Virginia holds those bonds in trust. Why? Because the State of Virginia alone had the right to come into a court of equity and demand that West Virginia should exonerate her by contributing a just and equitable part of the common burden that rested upon both.

Now it was stated further that under the act of 1881 a different form of liability was created. It is not improper for me to remind your Honors of a fact in history. There was a time when a tide swept over Virginia, a piratical crew seized the ship, headed by General Mahone and one Riddleberger, and they did essay to repudiate every dollar of Virginia's liability. The property owners, the debt payers, the respectability of the State, opposed it; but these two leaders summoned their cohorts from the masses of the people, and they did succeed in obtaining control of this Legislature, and they did attempt to repudiate the debt. But behind them stood the vested rights of the creditors under the act of 1871, and a score of cases came before this Court, in every one of which the liability of the State of West Virginia was recognized. In the case of Hartman and Greenhow your Honors laid down the doctrine of public law that the mere fact of separation placed by the operation of public law a liability upon both these divided, discordant, and belligerent sections, a common burden that each must contribute to.

Now in 1881 and 1882 they passed another act. I will ask your Honors to look for a moment at the certificate. You will find it on page 29, at the top of the page:

"No.

"The Commonwealth of Virginia has this day discharged her equitable share of the (registered or coupon, as the case may be) bond for dollars, held by....., dated the day of and numbered leaving a balance of dollars, with interest from to be accounted for by the State of West Virginia, without recourse upon this Commonwealth."

Such a fulmination coming from a debtor in his private capacity, that he had equitably discharged the debt that was held by his creditor, and evidenced by a bond, would be equally ineffectual. The clamor of the debtor, his avowed purpose to repudiate, the expression of his willingness to do it, and the statement in this formal manner that he had done it, was a mere *brutum fulmen* in the air. It amounted to nothing.

But what is the meaning of that statement that it was "without recourse upon this Commonwealth?" Did that mean as a proposition of law that the creditor could sue West Virginia, that the act of Virginia in setting apart one-third arbitrarily was binding upon West Virginia so as to create a cause of action against her, enforceable by the creditor? If it meant that, it would not be recognized by any court. What it meant really was what it elsewhere says on page 19 under the act of 1879. It was really meant to express the same thought, where the same repudiating legislature controlled by the same melancholy influences made this first essay at repudiation by the act of 1879. They said:

"The acceptance of the said certificate for West Virginia's one-third, issued under this act, shall be taken and held as a full and absolute release of the State of Virginia from all liability."

Did it rest there? No; it says:

"From all liability *on account of the said certificates.*"

There was no legal liability resting upon Virginia on account of those certificates. If they had said, "The acceptance by the creditor of this certificate shall be taken and recognized as an agreement upon his part to release Virginia from all liability upon her bonds," it might well be argued that the creditor had the right to release the debtor and that the acceptance of the new bonds operated as a release. But they were careful not to say so. They said, "It shall operate to release Virginia from all liability on these certificates."

I said yesterday that these certificates were no evidences of debt. They could not support an action. They were mere memoranda, mere declarations of trust, affording in a court of equity a basis for the recognition of the trust; but they went no further.

Now it was said yesterday that there was no evidence of liability anywhere. May I ask you to look at page 90 of our record? There is a statement made by the second auditor of Virginia on the 17th of September, 1902,—a tabulated statement which shows that the

total issue of what he calls West Virginia scrip was \$18,277,000 and odd dollars. Those are the bonds that are owned now, to-day, by the creditors of the old Commonwealth of Virginia; bonds which the creditors placed in the hands of Virginia upon the solemn trust, which she undertook, that she would hold them to abide a settlement with West Virginia and dedicate the proceeds of them to those creditors.

Now he says this is a suit for those people. Pardon an illustration. A mortgagor mortgages his property for \$10,000. The mortgagor has his unhappy day; creditors are pursuing him, and his mortgage is not yet due and cannot be enforced. He picks out certain of his creditors and executes a declaration of trust, and says that "the net proceeds of this mortgage, when foreclosed and recovered, I hold in trust for A, B and C, my creditors." Now suppose a bill of foreclosure is brought by the mortgagee against him: Can he come in, as West Virginia comes in here, on a demurrer, and say, "I as mortgagor no longer have any interest in these things; I have assigned the net proceeds of them?" There has been no assignment of the mortgage. The legal title is in him. The right of action and recovery is in him. He has merely dedicated the proceeds, when recovered and when received, to the payment of certain designated debts. These people who have a claim in morals and a claim in equity under this equitable assignment, would they be proper parties as defendants to a bill? Could they come in, or could the suggestion of their names be brought in, between an action of the mortgagee against the mortgagor to arrest the proceedings of foreclosure?

That is what Virginia has done. She says, "West Virginia owes in equity and good conscience a part of this common burden. I say to you creditors, who surrendered your bonds, that when that is recovered I hold it as a sacred trust fund, to be applied to the payment ratably on your debt."

One other point, and I conclude my share of this duty. There is a fourth assignment of error here in these words: It is the second in the course of the order followed:

"That this Court has no jurisdiction of either the parties to or the subject-matter of this action, because it appears by the bill that the matters therein set forth do not constitute, within the meaning of the Constitution of the United States, such a controversy, or such controversies, between the Commonwealth of Virginia and the State of West Virginia as can be heard and determined in this

Court, and this Court has no power to render or enforce any final judgment or decree thereon."

What are the controversies? The Constitution says that the controversies between two or more States are justiciable in this Court. It says that this Court has exclusive jurisdiction over such controversies. The Constitution sets no limit to the character or class of the controversies. It is broad and ample in its terms. It excludes, perhaps, criminal cases, but where resides the authority to say that thus far shall you go in the definition of a controversy under the Constitution, and beyond that you shall not proceed? What class of cases or controversies are you going to say are justiciable here under the Constitution, and what classes are excluded? There is no definition, no limitation. All civil controversies, money or other. If any are, these are justiciable here. But they say, "you cannot proceed here; a state cannot proceed as a trustee." Why, you have proceeded against a State as a trustee, the State of Michigan. In an opinion delivered by Mr. Justice Peckham, he says "Michigan is liable because she holds the money as a trustee." I use his language. Can it be claimed that the United States shall be sued as a trustee and yet not sue?

Suppose some benevolent person by grant or devise gives to the State of Massachusetts a hundred thousand acres of land lying within the limits of West Virginia, to be held by her in trust for three designated institutions of learning. It cannot be controverted that Massachusetts can take that trust. Since *Vidal vs. Guard's Exrs.* it has never been questioned that a corporation can take and hold, for any objects that are germane to the objects of its government, property as trustee.

Cannot Massachusetts take and hold on these trusts? Suppose West Virginia claims one half of that land, under some of her tax titles, and the Attorney General of Massachusetts advises that State that the claim of West Virginia is not well founded; that the claim is not a valid one, and cannot be maintained, and that it is the duty of Massachusetts, having accepted the trust, to protect the trust fund: How can she protect it? Can it be questioned that she can come into this Court, holding the legal title, and by her bill ask that you brush away the legal clouds that obscure her title? Where can you put your fingers on the fallacy of the reasoning? Where can you say the trust is not valid? The trustee may take; she may take, but cannot sue? In what character cannot she sue? Can she not come in here and state her claim and case? Can

she not come in here as the Commonwealth of Massachusetts, using the term or words trustee as a mere description of her person, or leaving it out, to set out the cause in the bill and will not your court as a court of equity make a decree according to the equity of the case?

So I say, by any analogy that is fair, you may find that a State may take and hold on trust; and if she can take and hold, what a mockery it would be to say that the courts of the land are not open to her to protect the trust funds that are in her hands?

But they say you cannot render a judgment, you cannot enforce a judgment. The argument is that a court will not do a vain thing. It will not proceed to judgment, there to be halted, if the court knows in advance that the judgment, if rendered, is an impotent judgment and cannot be enforced. It will not go through the mockery of a suit, will it? Judge Marshall, in one of his great judgments, called attention to a class of cases that received the court's jurisdiction by reason of the *subject-matter*, and another and wholly different class of cases that attracted the jurisdiction of the court by reason of the *parties*. You cannot enforce a judgment against a State? Why not? Because it did not enter into the contract in the beginning? Mr. Webster, in the well known letter to Baring Brothers, said that credit was given to a State on the faith one had in the sovereign. What sanction or security has the bond holder of a State? Has it ever been pretended, when this Court day after day renders judgment to the amount of millions of dollars against the United States—that it could award a writ of *fiery facias*? Has it ever been asked that you put a writ of *fiery facias* into the hands of your marshal and send him with a posse at his heels to the Treasury, where that writ would be an "open sesame" to fling open the doors of the Treasury to him, and allow him there to satisfy the judgment? What becomes of the sovereignty of the State—not in the ridiculed sense of that much abused word, but of a State that maintains its own existence, a State that keeps its own life in its body? What becomes of it if every creditor can come with his execution and subject to seizure the assets of that State, notwithstanding the obligations that rest upon it infinitely superior to those which it owes to its creditors? In that Parliament of Man which the poet looked forward to, we have erected a tribunal before which empires, kingdoms and republics come and submit to its jurisdiction. Has it ever been suggested by the boldest that power should be put into its hands to award a

writ, backed by physical power, to enforce the execution of the judgment that it rendered? May I commend to your notice the most philosophical, the most satisfactory exposition of this that I have been able to find? It is an opinion sirs, of the Supreme Court of Louisiana, delivered by one well known to some of you, in the case of *Carter v. The State*, in the 42 La. Annual. I have made quite a copious quotation from the case in my brief. You will pardon me if I read but the closing sentence on page 40. I ask you to look at it, at the closing of it:

"Counsel asks, of what use is the power to render judgment against the State, if the court is powerless to execute the judgment? That question was anticipated by Mr. Hamilton in the discussion of the Constitution of the United States before its final adoption. 'To what purpose,' he asked, 'would it be to authorize suits against sovereign States for the debts they owe? How could recoveries be enforced? It is evident that it could not be done without waging war against the contracting State.' Federalist, No. 81. He never dreamed that authorizing suit against a State would imply the right to issue *fieri facias* on the judgment.

"Puffendorff says: 'And if the prince gives the subject leave to enter an action against him in his own courts, the action itself proceeds rather upon natural equity than on municipal laws. For the end of the action is not to *compel* the prince to observe the contract, but to *persuade* him.'

"In England claims against the Crown might be prosecuted before certain courts, in the form of petitions of right, with the consent of the King, but it was held by Lord Mansfield that 'if there were a recovery against the Crown, application must be made to Parliament, and it would come under the head of supplies for the year.'"

Macbeth vs. Haldimand, 1 Durn. & East., 172.

By the way, that latter part is a part of the quotation, and the marks indicating it were left out by the printer. Then we add:

"We have examined all the authorities quoted by counsel and find none of them to support his contention. We are quite certain that no precedent exists sustaining the issuance of a *fieri facias* on a judgment against a sovereign State in her own courts, though rendered with her own consent.

"The only recourse for satisfaction is by application to the Legislature, with whom the judgment should surely have great *persuasive* force, but none *compulsive*."

If this demurrer is to rest upon the proposition that you have no

jurisdiction because you cannot constrain a State, or constrain the United States, by the menace of a *fiery facias*, then it needs no further argument from me. We need not go any further.

Have I occupied thirty minutes this morning?

MR. CARLISLE: Twenty-five minutes.

MR. ANDERSON: Take as much time as you like.

MR. CONRAD: Let me ask your attention, your Honors, a moment to the reasons that are given why this jurisdiction must exist. In the case of *Ableman v. Booth* the court says:

"The Constitution of the United States, with all the powers conferred by it on the General Government and surrendered by the States, was the voluntary act of the people of the several States, deliberately done for their own protection and safety against injustice from one another."

That is the reason that is given for the erection of this Court itself, to prevent injustice being done by one State to another. Judge Story says:

"Some tribunal exercising such authority, is essential to prevent an appeal to the sword and a dissolution of the government."

This Court said, in *Chisholm vs. Georgia*, that in every controversy of a civil nature between the States this Court has exclusive jurisdiction, and it was held by Mr. Randolph Tucker that these cases affecting boundaries and property rights and territorial rights of all kinds are proper cases for this jurisdiction.

We come here and rest our case upon three distinct grounds. They are stated here. They are rested upon the principles of public law quoted from the opinions of this Court, that "where a State is divided into two or more States, in the adjustment of liabilities between each other the debts of the parent State should be ratably proportioned among them." That is in *Hartman vs. Greenhow*.

MR. JUSTICE HARLAN: Please read that again.

MR. CONRAD: "Where a State is divided into two or more States, in the adjustment of liabilities between each other the debt

of the parent State should be ratably proportioned among them." That is an opinion of this Court that has received no dissent.

MR. CARLISLE: You do not claim that as a part of the opinion? There is no question of that sort in the case.

MR. CONRAD: I quote the language of Mr. Justice Field. He was speaking of this very Virginia debt. West Virginia was not a party to that suit, but the Court is here laying down a doctrine of public law which I do not understand can ever be *obiter dictum*. If the Court was rendering an opinion there on a state of facts involved in that case, in the absence of a party in interest, it would be *obiter*. But I do not understand that when this Court in any case announces without qualification a doctrine of public law or municipal law, that that would be taken to be *obiter*, because, if it is law, like the law of gravitation, it must be true in one case as in another. You cannot have law, public law, or the principles of public law, for one case, and the same principle with a modification for another case. So you cannot by an *obiter dictum* create law.

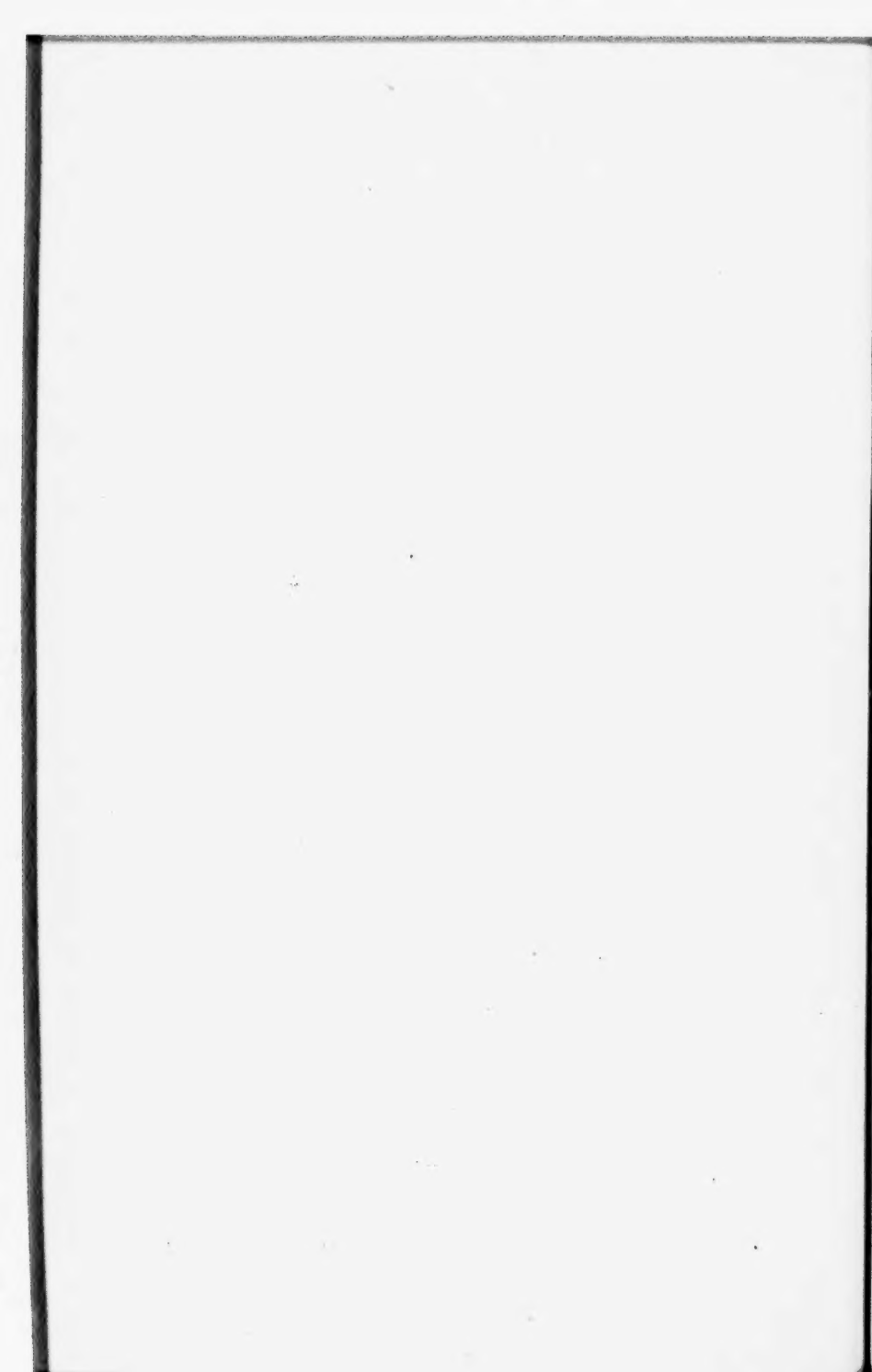
We rest again upon this ordinance of the convention of Virginia—"Restored Virginia"—to provide for the formation of a new State out of a portion of the territory of this State. That was the object of the ordinance, by which it was provided that "the new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the 1st of January, 1861;" and when this new-born State of West Virginia came to Congress for admission, she came with a constitution in her hands which, she said, laid down principles upon which she claimed to be a republican State—I mean republican in the broad constitutional sense—a republican form of government. And upon the faith of that constitution she was admitted into the Union.

That Constitution provides that "an equitable proportion of the public debt of the Commonwealth of Virginia prior to the 1st day of January, 1861, shall be assumed by this State, and the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

MR. JUSTICE HARLAN: What page of your brief is that on?

MR. CONRAD. Page 20. West Virginia demanded reinforcements in this case. The reinforcements came, and found a condition

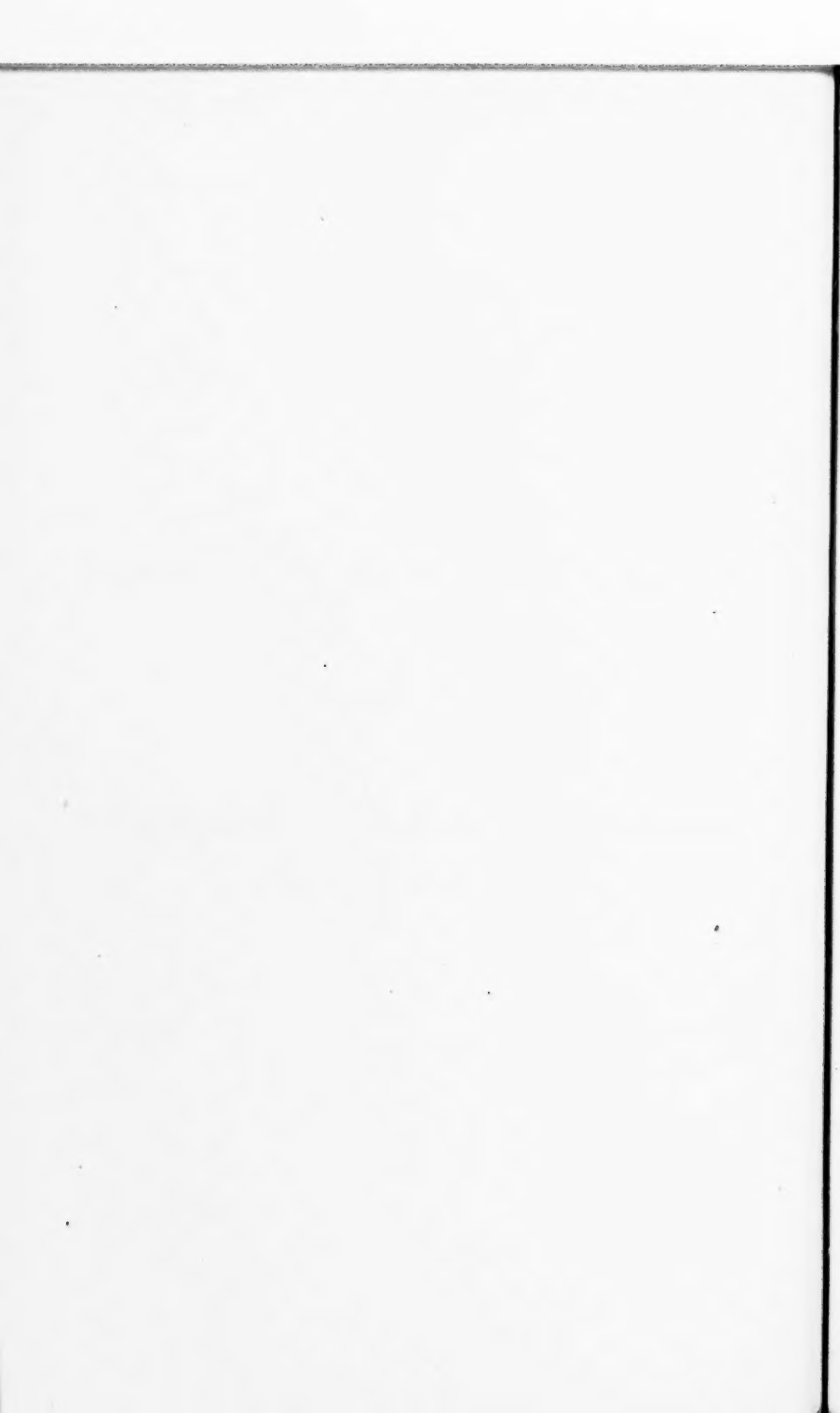
already existing. The reinforcements were not satisfied. They created a new ground of complaint, and I want my distinguished friend, when he stands here, to point out to you upon which ground of demurrer or under which ground of demurrer he finds this creation of his own fancy, this compact. He says that that provision which I last read to you, that the Legislature of West Virginia should ascertain the amount of the debt and pay it, created West Virginia an arbiter, a judge in its own case, to determine the fact and the amount of its liability, and to pay it. Shall I dignify that proposition by any argument to show that the word "ascertain" is to find out—learn from some auditor, learn from somebody erected and designated and empowered to ascertain this amount—learn what it is, and when you have learned it, provide by a sinking fund for its payment in thirty-four years? I ask you if that is not the strict, honest, fair meaning of the word "ascertain" as it appears there? Even taking the restored government of Virginia as it was, even assuming what was the actual fact, that although the same people, head by head, as the people of West Virginia, that their metamorphosis, their transition, their Jekyll-and-Hyde performance, that converted them from loyal Virginians into loyal West Virginians in 24 hours—even that would not have emboldened them to come forward and say that Virginia, by whatever appellation she might be known, had consented that a debtor should be the judge of the facts and the liability and the amount of the liability.



Supreme Court of the United States.

OCTOBER TERM, 1906.

Argument of Hon. William A. Anderson, Attorney General of
Virginia, for the Plaintiff.



IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

COMMONWEALTH OF VIRGINIA.

vs.

STATE OF WEST VIRGINIA.

ARGUMENT OF HON. WILLIAM A. ANDERSON, Attorney
General of Virginia, for the Plaintiff.

MR. ANDERSON: If your Honors please, from the statements of this case which have been made by the counsel for the defendant and the plaintiff, the court, I hope, has already apprehended the salient facts out of which the issues presented here arise. Some of the most important of those facts are matters of public history, of which the Court will take cognizance.

Whether *in invitum* or not—whether as a result of a legal fiction or not, Virginia was dismembered and partition made of her territory, and out of that territory, as it existed in 1861 and in 1863, a new State was created. Prior to the creation of the State of West Virginia, an indebtedness enormous, considering the then resources of the Commonwealth of Virginia, had been created for the purpose of carrying out the system of internal improvements, begun in the early 20's, in large measure, as the bill states, designed to develop and furnish access to the territory which now constitutes the New State. A significant fact in connection with the history of the creation of this debt is that a large portion of it, as the bill states, was placed upon the Commonwealth of Virginia by the votes of the Representatives of that portion of her territory which now constitutes the State of West Virginia, and against

the votes of a majority of the representatives of that portion of her territory which now constitutes the Commonwealth of Virginia; and that, as to nearly the whole of that indebtedness, it received the sanction of the representatives in her General Assembly from the region now constituting West Virginia, and would never have been contracted but for the authority and sanction thus given.

I mention these circumstances as constituting not only a part of our equitable claim, but of our just legal claim, against West Virginia.

There can be no question, I suppose, that, as a proposition of public law, this indebtedness which amounted at that date to about \$33,000,000, bound the entire people of the undivided State.

MR. JUSTICE BREWER: You say that these improvements were made partially for the benefit of West Virginia. Does the record show what the improvements were?

MR. ANDERSON: The record shows only general terms, not in detail, if your Honor pleases; They were canals, railways, turnpikes and other internal improvements. The record shows that several million dollars of the public moneys obtained by loans authorized by the laws of the Commonwealth were actually expended within what is now the territory of West Virginia, and that in larger measure these improvements were designed for the purpose of connecting West Virginia with the markets of the world and in developing the resources of what is now the territory of that State, in coal and iron and timber. The bill does not go minutely into the history of all these loans, because it would have unduly encumbered the record with a vast mass of statistics which could not throw any light whatever upon the principles to be decided by the Court.

Now if your Honors please, I suppose it will be accepted as a well settled principle of public law and public justice and public right that, on the 20th day of June, 1863, when West Virginia became one of the States of the American Union, that debt, independently of any stipulation between the parent state and her daughter, constituted an equitable and a moral claim, against the people and the property both of West Virginia and Virginia, and that, as has been decided by the Supreme Court of Virginia, in more than one case, and as has been held by this Court, both States and the people of both States were bound for the payment of those obligations.

As between the States this liability was limited by agreement, or by ordinance of convention, by provisions in the constitution and laws of the two states, which constituted an agreement, providing that as between the two States, the portion of the debt to be borne by West Virginia should be ascertained upon a prescribed basis.

But independently of this, according to recognized authorities, the debt should be ratably proportioned between the two states.

The most just, and a moment's consideration will show the most equitable, and having reference to the facts of this case, the fairest, basis of adjustment would have been to extend precisely the same rate of taxation upon the property of the people of both States until the whole debt should have been satisfied, principal and interest; and at the same time to have divided the public assets of the two States between the two States in proportion to their respective property values. That would have been a fair and just and equitable basis of settlement: Or else, the debt should have been divided, as of June, 1863, and not as of the arbitrary date fixed by the Wheeling ordinance, in proportion to the taxable values and with reference to the existing and prospective property conditions of the two States, because the debt was based upon the property both present and prospective of the original State. But by what is termed the Wheeling Ordinance, adopted by a convention, a revolutionary convention most irregularly assembled in the city of Wheeling, in August, 1861—

MR. JUSTICE HARLAN: There was a revolution all around, then, in the country.

MR. ANDERSON: There was, at that time revolution in the air, if your Honor pleases.

It was however a revolutionary convention, although its acts have been made *de jure* since, by recognition by the political departments of the United States Government, and of the government of Virginia and their validity can be no longer questioned.

I suppose there is no disagreement between counsel on that question.

This convention met at the city of Wheeling in August, 1861, and the circumstances that were referred to by my colleague as to that convention are worthy of consideration when you come to view its action. That convention gave the consent, and as we shall see, the only consent ever given by the Commonwealth of Virginia to the formation of the new State of West Virginia.

But the circumstance which has already been mentioned by my colleague, and which is a matter of fair consideration here now, that convention was elected by the same constituency which afterwards constituted the convention of the people of West Virginia, and in its personnel it was substantially the same as what was afterwards the convention of West Virginia, and to a large extent the same with the legislature of West Virginia; that the members of that Virginia convention went across the street to another hall and met subsequently in the same hall as the Legislature of West Virginia—

MR. CARLISLE: As the convention of West Virginia, not as the legislature.

MR. ANDERSON: Yes, as the convention of West Virginia; That is a circumstance to be considered in viewing the action of these conventions, and as justifying us in claiming that those stipulations shall not be construed rigidly against Virginia; that they should be construed liberally, as to her, the grantor, though she may be regarded as being, and strictly against a grantee who under these circumstances formulated the contract, which was to bind both parties.

MR. JUSTICE PECKHAM: Has this Court decided upon that point in the 11th Wallace case?

MR. ANDERSON: In the 11th Wallace case it was established that the Wheeling government was the government of Virginia, and the effect of that decision was to uphold the validity of what is known as the Wheeling ordinance.

Now instead of letting these questions be settled upon the principles of equity and public law, that convention prescribed this artificial and arbitrary basis of adjustment. We have to concede that we cannot go behind this, that we must accept it.

Section 9 of the ordinance, giving the consent of Virginia to the formation of the new State, reads as follows—

MR. JUSTICE HARLAN: What are you reading?

MR. ANDERSON: From the Wheeling Ordinance quoted at page 3 of the brief of the counsel for the plaintiff. Section 9 of the ordinance reads as follows:

"9. The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia, prior to the 1st day of January, 1861, to be ascertained by charging to it all of the State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government since any part of said debt was contracted, and deducting therefrom the moneys paid into the treasury of the Commonwealth from the counties included within the said new State during said period."

That is the basis upon which the consent of the Commonwealth of Virginia was given to the formation of this new State. The stipulation imposed by Virginia upon West Virginia as a condition upon which her consent was given, and which afterwards, in forming the State of West Virginia, the people of that new Commonwealth accepted and assented to, was that the new State should assume and take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the 1st day of January, 1861, to be ascertained in the manner therein prescribed. That was a fundamental as well as a contractual provision, and it constitutes a primary obligation and lies at the very foundation of the right of West Virginia to be a State.

Subsequently, there being some delay in the formation of the new State, various statutes were passed by Virginia, two of which are cited in the bill, making contributions to the new State when it should be formed. One of them is not cited in the bill. It is the statute of 1862, appropriating \$150,000 to the new State when formed. There are two statutes of the year 1863, and one of 1862.

MR. McCLINTIC: That was repealed by the act granting \$150,000.

MR. ANDERSON: I was not aware that that act was repealed.

MR. CARLISLE: It was repealed.

MR. ANDERSON: I accept the statement, as I only discovered that act a few days ago in looking over a compilation of the statutes of the Restored Government of Virginia, to which I had not had access before. The other acts are cited in the bill.

MR. JUSTICE HARLAN. When you speak of "the other acts," you include the act of February 3, 1863?

MR. ANDERSON: Yes, sir.

MR. JUSTICE HARLAN: Will you turn to the other acts?

MR. ANDERSON: Certainly.

MR. JUSTICE HARLAN: You say property belonging to Virginia to the amount or value of several million dollars was transferred from Virginia and was received by West Virginia on the express condition that the State of West Virginia should render an account. Does this record contain a statement of the circumstances surrounding the acceptance of that condition?

MR. ANDERSON: The record states that under that act, the act of February 3, 1863 several million dollars of the property of Virginia was turned over to and accepted by West Virginia.

MR. JUSTICE HARLAN: You mean there is an allegation on that subject in the bill that is to be taken as true on the demurrer?

MR. ANDERSON: Yes that the property amounted to several million dollars that West Virginia received as a result of that act.

MR. JUSTICE HARLAN: You say "as the result," and the brief says "on the express condition."

MR. ANDERSON: On the express condition prescribed in that act,—that it should be accounted for in the settlement to be made between Virginia and West Virginia. Here is the quotation:

"The State of West Virginia shall duly account for the same in the settlement hereafter to be made with this State, provided that no such property, stocks, and credits shall have been obtained since the reorganization of the State government."

That is to say, it should not include property that had been obtained by Virginia after the organization of the restored government.

Now, if your Honors please, by the terms of the Wheeling Ordinance, prescribing the basis upon which the debt was to be adjusted, there was no provision made for any contribution from Virginia to West Virginia by way of dowry or dot, starting the new daughter upon her career.

It was necessary that money should be provided for the maintenance of the new State, when it should be formed, until it could provide means from its own resources.

Nor did the Wheeling ordinance make any disposition of the

property distinctly belonging to the Commonwealth of Virginia and located within the State of West Virginia. The stocks of incorporated companies, particularly the bank stocks, and the other property of the State, consisting of large quantities of both real and personal property. But this act, which will be regarded, as I take it, as a constating enactment—this act was an essential part of the stipulations in reference to the creation of the new State, the partition of the common property of the old State and the assignment to West Virginia of a portion of it which the mother state was willing that she should receive, but upon a condition that it should be brought into account in the settlement to be had between the two States.

MR. JUSTICE HARLAN: The acts of 1863 are not printed in the record or in your brief?

MR. ANDERSON: No sir, they are not. There is nothing in either act inconsistent with the brief or the allegations in the bill. All that is material is printed.

MR. JUSTICE HOLMES: The provision for accounting is on page 5 of the record.

MR. JUSTICE HARLAN: Those acts should be in the brief.

MR. ANDERSON: If your Honors will allow us, we will file additional briefs. The briefs for West Virginia were handed us only on Saturday, and we have not had any opportunity to reply to them. In these additional briefs we will incorporate these Acts *in extenso*, or have them printed separately.

Now when the war ended and the Restored Government of Virginia became in fact and in law the only government of Virginia and was installed at Richmond—

MR. JUSTICE HARLAN: Was that the same government? Was that the same governor?

MR. ANDERSON: Yes; Francis H. Pierpont, the governor of the Restored Government of Virginia, moved with that government to Richmond and became the only governor of the Commonwealth, and his authority was recognized by all the people of Virginia. That government took steps looking to the settlement of the debt and appointed a commission to confer with West Virginia but its efforts were abortive. No satisfactory response was made; or such response as was made was made under such conditions or at such a time that

it was impracticable for the commissioners to meet, and so the matter stood until after the reconstruction of the State.

In 1869, a new Legislature of Virginia was elected and all the officers of the State government then chosen were subsequently installed. That Legislature, on the 30th of March, 1871, enacted the first general statute looking to and providing for a settlement by Virginia with the creditors of the common State. That statute is copied in full in the bill at pages 13 to 16.

Your Honors will observe that by that statute the Commonwealth of Virginia, then just emerging from the war, with her fields devastated and many of her homes in ashes, nearly all of her personal property destroyed, her real estate depreciated enormously in productiveness and in value, actually assumed not only two-thirds of the principal of the original debt, but assumed also two-thirds of all the interest which had accrued upon it including the war interest, and assumed two-thirds of the interest upon eight million dollars of that interest which had been already capitalized, and issued new bonds at six per cent interest for this two-thirds, which amount thus assumed aggregated more than the entire funded debt of the State as it existed on the 1st of January, 1861.

It was soon discovered that she had undertaken a burden which she was unable to bear, and various negotiations were had between her and her creditors looking to a farther adjustment of the debt; and there was litigation between her and her creditors, occasioned by efforts on their part, under the act of 1871 to intercept her revenue as it was flowing into her treasury.

As a result of those negotiations and controversies, both financial and political, various attempts at adjustment were made, all of which are set forth in the bill, until on February 20, 1892, a final settlement was made, which has been accepted by the creditors, and which is being carried out by the Commonwealth.

Now these matters are merely set forth in the bill, if your Honors please, for the purpose of showing the present relation of Virginia to these transactions, and giving frankly and fully a history of all her dealings in regard to the public debt. It is not pretended for a moment by the counsel for Virginia that West Virginia's rights could be affected or modified by these negotiations and contracts between Virginia and the common creditors, except in so far as payments under them might give Virginia an equitable claim to contribution from West Virginia.

In that connection I desire to call the attention of the Court to

facts which go far to show that Virginia, taking everything into consideration, has done as much, has made as great efforts, and as great sacrifices in order to satisfy the common indebtedness, as an exacting creditor could expect of her. I desire to call your Honors' attention to the statement furnished by the bill as to payments which she has actually made on account of that indebtedness. That statement is found on page 79 of the record, and is a part of the admirable address of Mr. Randolph Harris, made before the authorities of West Virginia, the joint finance committee of the Senate and House of the legislature of that State, in the winter of 1905. Its figures are taken from the records of the State.

It will appear from that statement that Virginia has paid, or has assumed and issued obligations for, and therefore satisfied, so far as West Virginia is concerned, the enormous sum of \$71,377,904.34, in principal and interest. And yet while Virginia has done so much, West Virginia has not paid one dollar on account of that debt.

MR. JUSTICE WHITE: Is this statement on page 79 exclusive of the one-third?

MR. ANDERSON That is exclusive of the one-third represented by the certificates of Virginia, but it is not exclusive, as I understand it, of certain obligations of the old State, which Virginia has paid in full. It includes all of her contributions from her treasury and her property in settlement of the common debt of the undivided State.

Now various efforts were made by Virginia to effect an amicable settlement with West Virginia at intervals from 1866 down to 1905, by proposing a reference of the matter to joint commissions, by a proposition of arbitration, and finally by the creation of what is known as the Virginia Debt commission under the Joint Resolution of 1894. Under that resolution an effort was made to bring about a conference between the representatives of Virginia and West Virginia, and an accounting, but the proposal then made by Virginia was declined, and West Virginia refused—failed and refused—to have even a conference with her for the purpose of endeavoring to ascertain by a free interchange of views whether some amicable settlement could not be reached.

It is true that in adopting that resolution the General Assembly prescribed as one of the limitations of the powers of that commission that not more than two-thirds of the debt should, as a result of that settlement, be assumed by Virginia. But there was no such

stipulation, as I understood my learned brother to contend for on yesterday; namely, that West Virginia should assume one-third of the debt. It was recognized that there would inevitably be some loss which would fall upon the holders of the securities of the original State. It was not contemplated or expected that West Virginia would undertake to pay one-third of the debt with the interest upon it from the first day of January, 1861, but it was hoped that she would meet her obligations to such an extent as would satisfy the common creditors and relieve Virginia from further liability in regard to the debt.

Those overtures failed—in fact they never reached the stage of a negotiation, because West Virginia refused to entertain the proposition at all.

In 1900 Virginia still endeavored to bring about such an adjustment, not only in her own interest but in the interest of her creditors, of all the common unsatisfied creditors of the two States.

Accordingly; the Act of March, 1900, was passed by the General Assembly of Virginia and approved by the Governor, which conferred upon the Commission additional powers, plenary and unrestricted powers, to make a settlement of this debt upon any terms which would be approved by the Commission, by the public creditors and by the Attorney General of the State, subject only to the qualification that the creditors should accept whatever might be recovered for them from West Virginia in satisfaction of their claims. There was no limitation in that Act at all, as to the proportion which West Virginia should pay, or the proportion which Virginia should pay. The whole matter is referred to the Commission with the absolute discretion and power to make a settlement which should be binding upon all parties, subject only to the qualification above stated. As appears from the bill and exhibits made a part of it, that Commission acting for the public good, and repressing the natural pride which men would feel under such circumstances, pocketed that pride, made a pilgrimage to the capital of West Virginia and solicited from the executive officers of that State and from its General Assembly an opportunity to be heard, which was courteously granted. Thereupon Mr. Randolph Harrison, one of the members of that Commission and its authorized mouthpiece, in an address which was made a part of this bill, and which conservatively and within the limits of truth presents Virginia's case, appealed to the authorities of West Virginia to have an accounting, an amicable adjustment, and frankly informed them that if that overture was de-

clined the only alternative would be a resort to the courts of the country for the redress of wrongs and for the vindication of rights which this record shows to exist. And so this suit was brought and a bill setting forth these facts was filed; and to this bill our friends come here and demur upon grounds which I shall now, very rapidly review.

It is not necessary to discuss the original demurrer, because that is merged in, and all points made in it substantially covered by the amended demurrer.

The first of those grounds is as follows:

“That it appears by said bill that there is a misjoinder of parties plaintiff and a misjoinder of causes of action. The said bill is brought by the Commonwealth of Virginia to recover debts alleged to be due to her in her own right from the defendant for property and money alleged to have been transferred and delivered to the defendant under certain acts of the Legislature passed in 1863, and also, as trustee for the owners of certain certificates mentioned and described in said bill, to have an accounting to ascertain and declare the amount claimed to be due from the defendant as her just proportion of the public debt of the plaintiff prior to the 1st day of January, 1861.”

It is impossible that there can be a misjoinder of parties plaintiff here, because there is only one plaintiff; as it would be equally impossible that there could be a misjoinder of parties defendant, because there is only one defendant.

If this ground of demurrer means anything it means, strictly speaking, that the bill is multifarious, because it joins different causes of action.

The demurrer assumes as true what the bill negatives.

It assumes it to be true that the bill is brought by Virginia not in her own right, but as trustee for certain holders of certificates whose names are not disclosed. The fact is that the bill is brought by Virginia in her own right only; only in her capacity as a state, her corporate capacity. It is not brought as trustee; it is not brought for the purpose of administering or executing any trust. She might possibly have been heard to maintain this suit as trustee, but she does not sue in that capacity. She sues only in her own right, and in the assertion of equities which I shall discuss later on.

This is a mistake which counsel have made from a too careless reading, or too superficial consideration of the bill. The learned counsel, our brethren from West Virginia, in their brief, actually

assert that the suit is brought for the certificate holders, that is, the holders of these receipts which Virginia has given to the holders of the obligations of the Old State.

The suit is brought by Virginia, and the rights which she asserts, and the remedies which she craves at the hands of this Court are apparent on the face of the bill. That objection, as your Honors will see, is founded entirely upon misapprehension.

But the counsel make another mistake. In arguing that point, the learned counsel who opened the case for West Virginia assumed, what is not true, that Virginia has been released as to the bonds of the old state represented by these certificates, and for which the certificates were given. They are mistaken as to that. The bill recognizes that certain obligations, legal obligations, still rest upon Virginia in reference to that unfunded portion of the common debt. Nor is that an open question, nor can it be a question in this case, for in the case of *Antoni vs. Wright*, in 22 Grattan, pages 864-5—

MR. JUSTICE WHITE. Is it referred to in the brief?

MR. ANDERSON. No sir, it is not referred to in the brief.

In a dissenting opinion, Judge Staples states in that case in concise terms the relations of Virginia in reference to that unfunded debt. The question was not directly presented in that case, but the views expressed by Judge Staples were not at all in conflict with the principles enunciated by the decision of the majority of the Court. The doctrine as laid down by him was afterwards approved by that Court in an unanimous opinion in *Greenhow vs. Vashon*, in which the Court, in its opinion quotes from Judge Staples' opinion and approves it.

MR. JUSTICE WHITE. What case is that?

MR. ANDERSON. That is the case of *Greenhow vs. Vashon*, reported in 81st Virginia, pages 336, 342 and 343. The Court will pardon me for reading briefly from that decision. In delivering the opinion of the Court Judge Richardson quoting Judge Staples' language and adopting it, says:

"I am therefore unable to perceive that the State has derived any advantage from the creditor's acceptance of the provisions of the Funding Act. The contract, if such it be, is wanting in the essential element of a valuable consideration, so much relied on in the opinion of the Supreme Court of the United States." "The creditor surrenders his bond and obtains a new one for two-thirds of his

debt, and coupons for the interest. For the remaining third the bond is held in trust by the state, and a certificate is given him stating that payment will be provided for in accordance with such settlement as may be made with West Virginia. If that State is faithful to the obligations resting upon her, the creditor will receive the other third also. On the other hand, if she repudiates these obligations, there is no agreement or understanding absolving the state from the payment of such third. It is as much bound for the payment of the whole debt as before the passage of the Funding Bill."

Your Honors will see from the statement filed with the bill at page 73 of the Record, that \$12,703,451.79 of these certificates issued under the Act of 1871 are still outstanding, leaving only about \$1,600,000 of the certificates issued under the subsequent acts in the hands of the public.

Again, our friends charge that the bill is multifarious because they claim that it unites several causes of action; and they base their argument chiefly upon the averment of the bill, that, under circumstances which are to be equitably considered in connection with the adjustment of this entire matter, Virginia has a right to bring into the account the money and property which, under the Acts of February 3rd and 4th, 1863, she voted to West Virginia.

There were large sums of money and several million dollars of property of the undivided State turned over to West Virginia under those acts upon condition that they should be accounted for in the settlement which was to be made between Virginia and West Virginia. Our friends say that that allegation makes the bill obnoxious to the objection of multifariousness, because it unites a legal demand with an equitable demand. In their argument they call it multifariousness; and if their objection made in their demurrer means anything, it is that the bill is *multifarious*, though they charge that it is a *misjoinder* of parties plaintiff and a *misjoinder* of causes of action.

Now, in the first place, if your Honors please, we deny that this demand set out in regard to the accounting for the money and property which were turned over to West Virginia under the Acts of February, 1863, is an independent and separate demand, or disconnected with the other demands made in this suit.

These transactions are all parts of one great transaction, the dismemberment of the State, the partition of her territory, and the apportionment of her debt and assets. West Virginia has received, as the bill avers, several million dollars of assets of the Undivided

state; and when Virginia states that fact in her bill brought for the purpose of bringing about a settlement with West Virginia, objection is made that that renders the bill obnoxious to the charge of multifariousness because it is an independent and separate transaction, and is uniting a legal demand with an equitable demand.

MR. JUSTICE MOODY. Mr. Attorney General, do I understand, by the course of your argument, that you understand that when one state comes into this Court and presents a statement of its controversy with another state, that that statement is to be adjudged by the rules of common law or equity pleading. Do you state that?

MR. ANDERSON. I do not state that. This Court is governed by the rules of pleading adopted by the Chancery Courts of England.

MR. JUSTICE HARLAN. Why is it governed by them?

MR. ANDERSON. This Court has adopted them under its rule as a guide only, but it is not of course absolutely bound by them.

MR. JUSTICE HOLMES. May it not be that when you come to controversies of this nature that somewhat more liberal dealings should be the guide?

MR. ANDERSON. It is not necessary to ask for indulgence at the hands of this Court upon this question. The authorities without exception justify just such pleading as we have resorted to, and the assertion of just such claims as we have blended together.

MR. CHIEF JUSTICE FULLER. You are willing to have the bill sustained on any grounds, are you not?

MR. ANDERSON. On any grounds (laughter).

But I want to meet the objections of my friend, the learned counsel who opened this case for West Virginia.

I am grateful that our learned friend has written a book, an admirable book upon the subject of Equitable Procedure and Practice. At Section 136 of the first volume of Hogg's Equity Procedure, published in 1903, the learned author lays down the principles and doctrines which govern this question in language which I would not change if I had been dictating it for the purposes of this case. It seems to be an excellent treatise on this subject.

"Courts of equity," he says, "have declined to announce a general rule applicable to all cases of multifariousness, being guided by considerations of convenience in each particular case rather than by any absolute rule. But there are certain cardinal principles which have been established by repeated and numberless decisions in the courts of equity, and, if borne in mind, it will seldom, if ever, be found difficult to determine whether multifariousness exists in the particular case." And now the learned author, who is the learned counsel in this case for West Virginia, states what those principles are:

"First, a bill will always be deemed multifarious where several matters joined in the bill against one defendant are so entirely distinct and independent of each other that the defendant will be compelled to unite in his answer and defend different matters wholly unconnected with each other, and as a consequence the proofs applicable to each would be apt to be confounded with each other, and great delay might be occasioned respecting matters ripe for hearing by waiting for proofs as to some other matter not ready for hearing.

"Second. It will be treated as multifarious where there is a demand of several matters of a wholly distinct and independent nature, in the same bill, rendering the proceedings oppressive because it would tend to load each defendant with an unnecessary burden of costs by swelling the pleadings with the statements of the several claims of the other defendant or defendants, with which he has no connection.

"Third: A bill against two or more defendants will be regarded as multifarious which also embodies a separate and distinct claim against one of the defendants only.

"Fourth. A bill will not usually be regarded as multifarious where the matters joined in the bill, though distinct, are not absolutely independent of each other, and it will be more convenient to dispose of them in one suit.

"Fifth. A bill against several defendants who have a common interest centering in one point will not be held multifarious."

Now we are willing to rest this case as to this ground of demurrer upon those propositions, thus aptly expressed by the counsel for West Virginia; but the learned author goes further, and states a principle that he says is settled by all the decisions, and which absolutely disposes of his demurrer upon this ground, and that is:

"Sixth. A blending of two causes of action in the same bill, one

of which is of equitable cognizance and the other legal, will not render the bill multifarious, as the latter will be treated as mere surplusage and stricken from the bill and the cause retained as to the equitable ground of suit."

I need make no other reply, and could make none more conclusive, to the argument of the learned counsel, or the briefs filed in this cause, upon that point.

The second ground of demurrer is that this bill does not present a controversy within the meaning of Section 2, of Article III, of the Constitution of the United States, which confers upon this Court jurisdiction to hear, try and decide all controversies of a civil character between two or more states. As we have argued in our brief, the word "controversy" has been too frequently interpreted by this Court to leave any doubt as to its meaning as applied to this case.

It is precisely the same word by which jurisdiction is conferred upon Federal courts of controversies between citizens of different states, of controversies to which a state is a party, and of controversies to which the United States is a party. Again and again, from the case of *Chisholm, executor, vs. Georgia*, to the last decision rendered involving this question—that in the case of *United States vs. Michigan*, 190 U. S., pp. 379, 396 and 406, has this Court held that it embraced every kind of civil controversy which can arise between individuals or communities. No case has ever arisen in this Court in which a state has ever before asserted a pecuniary demand against another state, but Chief Justice Marshall passed upon that question. Our friends will probably say that it was an *obiter dictum* of the Chief Justice, but in *Cohens vs. Virginia*, the great Chief Justice was defining the word "Controversy," and adjudicating the question as to the effect of the adoption of the 11th Amendment upon the jurisdiction of this Court, and his discussion of the meaning of that word, and of the effect of that amendment upon the jurisdiction of this Court as conferred by Section 2 of Article III of the Constitution, was entirely germane to the main question in the case then being considered. The Chief Justice in that celebrated case decided that jurisdiction of all controversies of whatever character between a foreign state and one of the United States, or between one of the states of the United States and another state of the Union, was not affected by the 11th Amendment, but was still conferred upon this Court.

And in the case of the *United States vs. North Carolina*, 136 U. S., 211 this Court took jurisdiction of a suit brought by the United

State against the state of North Carolina to recover interest upon bonds of the State of North Carolina.

Our friends may say that the question of jurisdiction was not raised in the case. This Court said in 143 U. S., 621, in *United States vs. Texas*, that the question of Jurisdiction was considered by this Court in *United States vs. North Carolina*; that it was necessarily considered because this Court could not acquire jurisdiction by consent, could not exercise jurisdiction nor take jurisdiction in a case without passing upon the question of its right to exercise jurisdiction. And the question was considered and finally disposed of by this Court in *U. S. vs. Michigan*, which was a suit for money, a pecuniary demand asserted by the Government of the United States against the State of Michigan, in which this Court took jurisdiction, and in which this Court held that it not only had a right to decide and adjudicate the case, but to enter up judgment. In the last paragraph of the decision of the learned Judge who gave the unanimous opinion of this Court in that case it is declared:

“There must be judgment overruling the demurrer, but as the defendant may desire to set up facts which it might claim would be a defense to the complainant’s bill, we grant leave to the defendant to answer up to the first day of the next term of this Court. In case it refuses to plead further, the judgment will be in favor of the United States for an accounting and for the payment of the sum found due thereon.” 190 U. S., 406.

Now if this Court can not execute a judgment of the United States against a state; if a judgment of this Court in favor of the United States against a state is a valid judgment, although no execution of *fieri facias* may effectively issue upon it, and no process can be awarded upon it which will compel the defendant state to obey such judgment and pay the amount which it shall award, then by the same token and the same argument, a judgment of this Court in favor of one state and against another would be valid, if such a judgment of the United States against a state is valid.

The third ground asserted in the demurrer is:

“That it appears by said bill that the plaintiff herein sues as trustee for the benefit of a number of individuals who are the alleged owners of certain certificates in the said bill set forth and described.”

If your Honors please, that statement comes, as has been already pointed out, entirely from a misapprehension of the bill. The bill is not brought in the name or for the benefit of the bond holders, or of the certificate holders, whose bonds were deposited with Virginia and which she holds as trustee; but the suit is brought by Virginia in her own right, and in the assertion of two equitable grounds of relief which will be hereafter mentioned. I frankly concede that any judgment in this case in favor of the Commonwealth of Virginia must enure to the benefit of the common creditors of undivided Virginia, whether they be those who have deposited their obligations in her custody, or be those who have not, up to the present time, deposited their obligations in her keeping.

In the very nature of things, if your Honors please, no suit could be prosecuted in this Court to decree, ascertaining the liability of West Virginia upon any one, or any one hundred of the obligations of the Old State, which would not ascertain her liability upon the entire debt, and therefore necessarily operate to the advantage and benefit of all of the common creditors of the Commonwealth. So that, in that sense, the suit is for the benefit of the creditors of Virginia to whom she has given her certificates, but it is no more for their benefit than for the benefit of all the other creditors of Virginia.

Now what are the equities that Virginia is asserting? The first is the equity of contribution.

Our friends, either because they have failed carefully to read this bill, or are strangely misapprehending it, state that Virginia has paid no part of this debt excepting her own share. The fact is, and the bill shows it, that Virginia has paid in full some millions of dollars of the common obligations, the *ante-bellum* obligations, of the State. Our friends failed to note that upon the face of the bill, and in express terms, a statement was made of this claim as a basis upon which the state is entitled to contribution from West Virginia. At page 9 of the bill, paragraph 16, there is this brief statement of that claim:

“Of the evidences of indebtedness representing principal and interest of the liabilities of Virginia, contracted before her dismemberment, those so paid off or retired by your oratrix and now held by her in her own right, exclusive of the amounts represented by the certificates issued under the Funding Acts aforesaid, amount in the aggregate, including the interest to be fairly computed thereon to this date, considerably in excess of \$25,000,000, by far the greater part of it

being now, of course, on account of the interest computed thereon, at the rate of 6 per cent per annum, the then legal rate in both states. For all of these obligations taken up and payments made on account of the common debt, your Oratrix has in her own right, a just claim against West Virginia for contribution to the extent of West Virginia's equitable liability therefor."

And we invoke the equitable jurisdiction of this Court for an accounting with West Virginia, in order to ascertain the amount to which Virginia is entitled to contribution from West Virginia by reason of the fact that Virginia has satisfied in full obligations of the old state aggregating, as of this date, including interest from 1861, over \$25,000,000. So as to that, Virginia makes a substantive demand upon West Virginia for such amount—as shall be ascertained under a decree of this Court, after an accounting shall be had, to be West Virginia's fair and just aliquot portion of the liabilities of the common state which Virginia has paid in full. Our friends misapprehended that claim and the statement of facts made in that paragraph of the bill.

Now, if your Honors please, another and equally valid ground of equitable jurisdiction which this bill invokes is, that there shall be an accounting with West Virginia for the purpose of ascertaining her portion of this indebtedness, and having that liability of West Virginia adjudicated, not by way of contribution to Virginia, but in exoneration of Virginia. All the authorities recognize this as an equitable ground of relief, and Virginia's claim to it here is of the highest equity. As has been decided by her own Court, in the cases to which I referred, and as appears from an examination of the contracts which she made, Virginia is still bound for \$12,700,000 as of July 1st, 1871, being the one-third of the bonds which were funded under the Act of March 13th, 1871, and for which one-third she gave her certificate to the common creditors. That is still a claim against Virginia, and a common burden upon Virginia and upon West Virginia, to the extent of West Virginia's equitable liability; and Virginia seeks the aid of this Court for the purpose of obtaining exoneration to the extent of West Virginia's liability therefor. Independently of any contract between her and the common creditor, and the certificate holders to whom the bonds of the undivided State belong, she is entitled to this relief and exoneration, to the extent of West Virginia's liability, from the common burden resting upon both states, it being conceded that West Virginia's portion of that liability must be ascertained upon the artificial and

arbitrary basis prescribed in the Wheeling ordinance of August 20th, 1861.

But she has a further, and for her perhaps, a more important relief to ask at the hands of this Court, by reason of her contact with the holders of more than nine-tenths of the certificates issued by her under the funding Act of 1871. This agreement was made by her creditors in recognition of the large provision which she had already made for the common creditors; namely, that those creditors would accept not merely or in fact such sum as might be recovered from West Virginia—I wish your Honors to observe the language of the stipulation,—not merely that they would accept such sum as should be recovered from West Virginia, but that they would accept the adjudication of this Court against West Virginia in full satisfaction and discharge of any claim or liability which the common creditor might have against the Commonwealth of Virginia. Now as to that stipulation, West Virginia's rights are not affected by it, nor is it prejudicial to West Virginia; nor is it a stipulation of which West Virginia has any right to complain, because it does not add one cent to and cannot increase in the slightest degree the liability or obligation of West Virginia. The contract will be found at pages 83 to 86 of the bill. It is not necessary that I shall read it, because I have stated accurately its stipulation, that the creditors to the extent of these millions, of these certificates for these deposited bonds, will accept the adjudication of this Court against West Virginia in full discharge of any farther claim against Virginia. That gives Virginia a direct personal property interest in this adjudication, an interest co-extensive with the amount of the common unsettled liability, an interest as important to her as if she had actually paid off the whole of the \$12,700,000 of certificates and a right to relief because of that interest, by obtaining an adjudication against West Virginia. And it boots not, in reference to this aspect of the case, whether this Court is powerless to enforce its decree or not. Its decree will be as effective, by the stipulation between Virginia and her creditors, it will be as effective to give her immunity from further liability and exonerate her from any claim as if the the execution could be levied upon \$50,000,000 of money of West Virginia in the Riggs Bank in the city of Washington.

Recess until 2:30 P. M.

AFTER RECESS: 2:30 P. M.

MR. ANDERSON: If your Honors please, in the few minutes

that are left to me, I will refer briefly to the grounds of demurrer which I have not already considered, most of which have been so satisfactorily and exhaustively discussed by my colleague as to obviate any necessity on my part for any elaborate reference to them.

The fifth ground of objection assigned in the amended demurrer is, that it does not—satisfactorily appear—that the Commonwealth has ever authorized this suit to be brought. I hope it is not necessary that I should show my warrant of attorney for appearing here for the Commonwealth, but I will say to the learned and distinguished counsel who is to follow me (Mr. Carlisle), that that warrant is as plenary and as authentic as that which authorizes him to represent West Virginia, and which I do not impeach. This suit is brought entirely within the limits of the authority conferred by the General Assembly upon the Virginia Debt Commission, and the bill avers that it is brought in strict conformity with those powers, and not only avers it, but the exhibits filed with the bill prove the allegation.

The sixth ground is that the bill does not definitely and sufficiently set forth the reasons and demands asserted by the plaintiff.

I do not understand exactly what is meant by that assignment of objection. As it could not be contended that a surviving partner who was suing for a settlement with his co-partner, after a dissolution of the partnership, should state precisely the balance of account between them—so a claim that there shall be any such particularity of allegations here, can have no foundation, for the very object of this suit is to ascertain what the parties could not ascertain, namely, what is the state of the accounts between them; and that is the very question which is referred to this tribunal which is vested with judicial power for the purpose of adjudicating all such controversies.

The seventh ground of objection assigned in the demurrer is, that the allegations in the bill are not sufficient to entitle the plaintiff either in her own right or as trustee, to an account. We have shown that our suit is for exoneration and contribution, and that an accounting is necessary to determine the respective rights and liabilities of the parties.

The eighth ground is that the bill does not contain any prayer for a judgment or decree or any other final relief against this defendant. The bill asks for an adjudication against the defendant and for general relief; and in our brief we have shown that the prayer

is ample according to English Chancery practice, and repeated adjudications of this Court.

Now in the remaining five minutes of my time I will briefly refer to the last ground of objection, made for the first time in the briefs of the learned counsel, and one upon which they seem chiefly to rely; Which is, that there was a compact between Virginia and West Virginia by which it was covenanted by Virginia and West Virginia, that the Legislature of West Virginia, should be the final arbiter of all matters in controversy between the two states with reference to the amount and payment of the common debt. The language of the instruments upon which counsel rely justifies no such conclusion. One is an alleged Act of the General Assembly of the Restored Government of Virginia, of May 13th, 1862, by which Virginia gives consent—the date is important, if your Honors please—by which on the 13th of May, 1862, Virginia gives her consent to the formation of the State of West Virginia in accordance with the provisions of the Constitution which had been proposed by a convention of the people of West Virginia which met in the month of November, 1861. Now is it a fair conclusion from the language used in that Act, and the language used in the proposed Constitution for West Virginia in regard to the public debt, that Virginia, by giving her sanction in that form to the formation of the State of West Virginia, bound herself irrevocably and eternally to abide by an adjudication or ascertainment of the amount of liability of West Virginia to be determined by West Virginia? It is incredible that sane men fairly representing the interests of the Commonwealth of Virginia should have assented to any such proposition, and the language that they used cannot be construed fairly or justly to have any such effect. The provision in the Constitution of West Virginia relied upon was designed as a mandate from the people of West Virginia to its own representatives, imposing upon them a duty, namely, as soon as practicable to ascertain the amount of West Virginia's portion of the public debt, and to provide for a fund for the payment of interest and the extinction of the principal thereof in thirty-four years. It has now been nearly forty-four years since West Virginia became a state, and she has done nothing in this regard. But, if your Honors please, the Constitution which was in fact adopted by West Virginia has never been approved by Virginia; nor has Virginia, except by the Wheeling ordinance of August 20, 1861, ever given her valid consent to the formation of West Virginia. If the Act of April 13, 1862, is a valid Act, which we deny, she has not

given any such consent by that Act, for the reason, and the conclusive reason, that the consent there given was for the formation of the new state in accordance with the provisions of a constitution which had been proposed by a West Virginia convention which first assembled in November 1861, and that is not and never was the constitution of West Virginia. Congress gave a conditional consent to the formation of the State of West Virginia, and the condition upon which that consent was given was that West Virginia would adopt an amended constitution; and it appears that West Virginia did adopt an amended constitution in 1863, which is found in the volume entitled *Constitutions and Statutes of Virginia and West Virginia, 1861 and 1866*, published at Wheeling, under the Act of the Legislature of West Virginia enacted in 1866. That amended constitution was proposed and submitted to the people of West Virginia, and was adopted by the people of West Virginia, long after the alleged Act of May 13, 1862, and became the constitution under which West Virginia was admitted into the Union. Virginia never approved of or gave her consent to that amended constitution. So that my friend's contention that there is any compact falls, because the constitution which was the consideration of that supposed compact and upon which it was predicated, has no existence, but was afterwards repealed and abrogated by the adoption of an amended and a different constitution.

In addition to that, if your Honors please, if there had been anything in the contention of our friends, West Virginia has repealed and repudiated any such liability or obligation. In 1872 West Virginia adopted her present constitution, and it contains the only expression of the fundamental law of that State. From that constitution this covenant, as our friends on the other side are pleased to term it, was eliminated; and the mandate of the people of West Virginia that the Legislature of that State should ascertain and provide for the payment of West Virginia's just share of this debt, contained in the former constitution, was stricken out, thereby leaving this question where the law of the land leaves such controversies, solely within the jurisdiction of this Honorable Court.

If your Honors please, I have but one word more to say. All that Virginia asks here is that what is right shall be done; that she shall not be denied the relief to which she is entitled, either upon the narrow technical grounds of defense which are asserted here, or by reason of ingeniously contrived construction of Acts of the Legislature of Virginia, and of provisions of the former constitution of

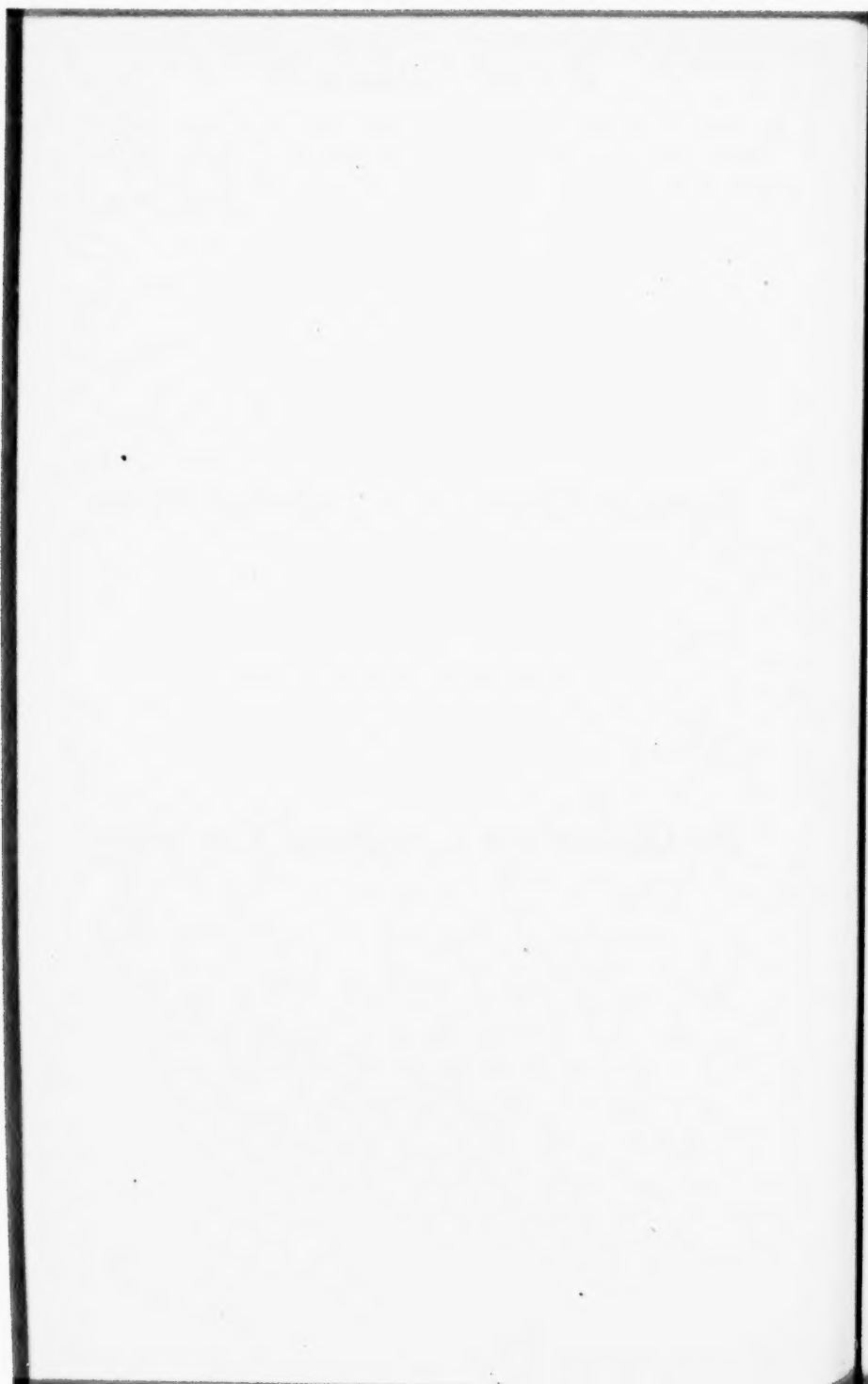
West Virginia, which reasonably interpreted cannot possibly be given any such meaning as is contended for by the learned counsel.

I thank the Court for the kind and patient attention which they have given me.

Supreme Court of the United States

OCTOBER TERM, 1906.

ARGUMENT OF HON. J. G. CARLISLE, for the Defendant.



IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

ORIGINAL No. 7.

COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

ARGUMENT OF HON. J. G. CARLISLE, for Defendant.

MR. CARLISLE: If your Honors please, I thought from what was said by the Attorney General for the State of Virginia, in his address to the court before the recess, that it was conceded by him that the compact which is set up in the bill was binding upon both States, and that the settlement of the controversy between them must be made by this or some other tribunal in the manner prescribed in the Wheeling ordinance. I am somewhat surprised, therefore, to see, when he comes back since the recess, that he takes the position that there is no compact between the two States. I do not propose, however, to discuss that question at the beginning of my remarks, but I had thought that this concession upon the part of the representative of Virginia would enable me to abbreviate my argument to a considerable extent.

MR. ANDERSON: I did not use language of that kind.

MR. CARLISLE: The counsel read the ordinance, and then stated distinctly that that was the compact binding upon the parties.

Of course the ordinance itself could not constitute the whole compact; it was the act of only one party. The compact had to be made between both parties, and the State of West Virginia, when the convention assembled to form a constitution, accepted the proposition

made by Virginia in the ordinance that she should assume her just proportion of the public debt to be ascertained in a certain manner, but with the condition that her own legislature should ascertain what that proportion was, and provide for its payment by the establishment of a sinking fund.

But I pass from that for the present. The first question to be considered in this case is whether the court has jurisdiction, for if it has not, it will not decide any other question raised by the demurrer. The court, however, cannot decide whether it has, or has not, jurisdiction of the case without first ascertaining the character of the parties, the nature of the claim asserted, and the character and extent of the relief demanded. I propose first to show what Virginia has done with regard to the old public debt, and in doing that it will be made apparent to the court why we have fallen into what counsel say is a misapprehension of the bill, and why we are contending that Virginia is suing in a representative capacity as trustee for the owners of the certificates.

In the first place, it is distinctly alleged in the bill that Virginia holds these bonds in trust. The exact language is that Virginia "received and holds said original bonds, so far as unfunded, in trust for the creditors who deposited the same with her, or his assigns"; and when we look at the prayer of the bill, we find this language: "That the said State of West Virginia may be made a party defendant to this bill, and required to answer the same, that all proper accounts may be taken to determine and ascertain the balance due from the State of West Virginia to your Oratrix, in her own right and as trustee as aforesaid." But if the words trust or trustee had not been used in the bill, the court, after an examination of the several statutes passed by the legislature of Virginia, and the contract made between her commission and the creditors, could reach no other conclusion than that the State is suing here, so far as the settlement of the old debt is concerned, not in her own right, but as a mere representative of the holders of the certificates. She has bound herself by contracts through her commission, appointed under her own statute and clothed with her authority, to prosecute this suit for the settlement of the certificates, and to pay over the money that may be recovered, whatever it may be, to a committee appointed by the creditors, not even allowing this court, or any other court, the power to direct the distribution of the fund among the beneficiaries when it is received, as I will show the court before concluding.

Now the first act of Virginia to provide for funding her debt was passed on the 30th of March, 1871; and I desire to call the attention of the court for a moment to some of its provisions, because it has been argued here that notwithstanding the act, and notwithstanding what was done under it, the State of Virginia still remains bound for the unfunded one-third of the public debt. I think the creditors of Virginia will be very much surprised and very much pleased when they hear that her counsel have taken that position. The act provided for the funding of two-thirds of the principal and interest of the debt, and declared that it was Virginia's full equitable share of the indebtedness; and it provided that certificates should be issued to the holders of the debt for the other one-third, to be provided for in accordance with such settlement as might thereafter be made with West Virginia. It expressly required every one of the bonds to be surrendered to the treasurer of the State of Virginia, and cancelled; so that not only was Virginia's liability for the unfunded portion released, but the evidence of the debt itself was extinguished.

MR. JUSTICE BREWER: Were all the bonds surrendered?

MR. CARLISLE: Not all under that act. I will come to that after while.

MR. JUSTICE WHITE: Was that the act referred to in the 81st Virginia case?

MR. CARLISLE: Yes, sir, that was the act; and I wish to say, without disrespect to the court by which that action was decided, that the only controversy in the case related to the right of a holder of coupons to have them received in payment of taxes. They were coupons attached to bonds issued by Virginia under the act of 1871.

MR. JUSTICE WHITE: It was stated that the effect of that was not to release Virginia?

MR. CARLISLE: But there was no such question in the case. In the case of *Higginbotham vs. The Commonwealth*, 25 Grattan, 627, the court expressed the opinion that the two States were bound ratably to the creditors for the old debt as it stood in 1861, but that question was not involved in the case.

MR. ANDERSON: The *Higginbotham* case was directly in point.

MR. CARLISLE: I have examined that case carefully, and the only question was as to the liability of Virginia for the payment of dividends on the capital stock of the James River and Kanawha Company, and the court expressly stated that the question of Virginia's liability for the one-third of the debt not funded under the act of March 30, 1871, was not involved in the case, and that it expressed no opinion on that subject.

I will read the language of that act from my brief, though the act is printed in full in the record. I read from page 7 of the brief:

"Upon the surrender of the old and the acceptance of the new bonds for two-thirds of the amount due, as provided in the last preceding section, there shall be issued to the owner or owners, for the other one-third of the amount due upon the old bond, stock, or certificate of indebtedness so surrendered, a certificate bearing the same date as the new bond, setting forth the amount of the bond which is not funded as provided in the last preceding section, and that payment of said amount with interest thereon at the rate prescribed in the bond surrendered, will be provided for in accordance with such settlement as shall hereafter be had between the States of Virginia and West Virginia in regard to the public debt of the State of Virginia existing at the time of its dismemberment."

Now what obligation did Virginia assume by the issue of that certificate?

MR. JUSTICE HARLAN: Your quotation reads further: "And that the State of Virginia holds said bonds, so far as unfunded, in trust for the holder or his assigns."

MR. CARLISLE: In trust, yes, sir; that is stated in the act, and in the certificate issued for the one-third.

MR. JUSTICE HARLAN: You said the bonds were cancelled.

MR. CARLISLE: They were. That is shown at the top of the next page. All the acts required the surrendered bonds to be cancelled, and one of them provided that they should be cancelled by punching holes through them.

MR. ANDERSON: The contract was endorsed.

MR. CARLISLE: There is no evidence of that in the record.

MR. ANDERSON: You will find it on the books, an endorsement on each bond.

MR. CARLISLE. I have seen only what the act says. It was provided in every one of the acts that the bonds should be cancelled.

MR. JUSTICE HARLAN: It says: "But in cancelling and registering the bonds as above directed, in every bond and coupon surrendered under this act holes shall be punched in one or more places, and in such a manner as to render a new funding of the same impossible, and every bond and coupon so cancelled shall be filed for reference.

MR. CARLISLE: Now, what was the obligation assumed by Virginia by the issue of these certificates? Was it to pay money? None of the counsel has said to the court that if Virginia should fail to provide for this additional one-third by a settlement with West Virginia, that the holders of those certificates could come back upon the State of Virginia and demand their amount in money. That has not been suggested. What the holder could do, perhaps, would be to demand his bond, but that would be of no value to him, because the bond has been cancelled, and I will also show before I get through that nearly all of the holders of the certificates issued under the act of 1871 have deposited their certificates with the commission under a contract which releases Virginia.

MR. JUSTICE HARLAN: If Virginia had a settlement, would not it be bound by these acts to contribute for payment the amount of those certificates?

MR. CARLISLE: I think under the contract with her commission she would have to pay the certificate holders whatever she might receive from West Virginia, but no more; and she is suing for that, and according to my understanding of what constitutes a trustee, this makes her a trustee just as much as the State of Kansas was trustee for the Missouri, Kansas & Texas Railway company in the case decided in this court only two weeks ago.

The next act was March 28th, 1879. It contained the same provision with regard to the cancellation of the bonds, provided that exactly the same kind of certificate which had been issued under the act of 1871 should be issued to the holders of bonds that might be surrendered under the provisions of that act, and it expressly provides in the body of the act that persons who present their bonds for refunding and accept certificates thereby release Virginia from all obligations upon the certificates.

Then the next act was in 1882, and it contained precisely the same

provision in regard to the cancellation of the bonds; and provided for the issuance of certificates. Certificates were issued in which the parties receiving them agreed that they would look to West Virginia for the one-third, without any recourse upon Virginia. Counsel says that such a certificate was merely a memorandum made by Virginia herself, and amounts to nothing; but if your Honors please, when a bondholder surrendered his bond and accepted a certificate under these provisions, he agreed to look to West Virginia for his debt, and that he thereby released the State of Virginia. And, moreover, as I have said, the act itself under which the refunding was made, provided that if he took the certificate, he should release the State of Virginia.

The act of 1902 contained exactly the same provision with regard to the cancellation of the bonds, and with regard to the certificates for the unfunded one-third, absolutely releasing Virginia from all liability on account of debt. And then, in addition to all this, in 1894 the State of Virginia passed a joint resolution providing for a commission to adjust the old public debt; but I will not stop now to read it. The preamble recites that Virginia had already settled, to the satisfaction of her creditors and her people, her two-thirds of the debt. And then the commission was authorized to negotiate with the State of West Virginia, but only upon the basis that the State of West Virginia would agree that the share of Virginia was only two-thirds; and if such was the case, of course West Virginia's share must have been one-third. Gentlemen admit in the argument that it would be impossible for the court to ascertain West Virginia's share without also ascertaining Virginia's share, because Virginia's share, as between the two States, is the whole of the debt less West Virginia's proportion.

No adjustment was made by the commission. Mr. Randolph Harrison, a member of the commission, went down, as has been stated today, to West Virginia, with this resolution in his hand, which was the only authority he had, to demand that West Virginia should acknowledge her liability for one-third of the debt.

MR. ANDERSON: I beg pardon, but that was the act of 1900.

MR. CARLISLE: I will show that the act of 1900 did not repeal that part of the joint resolution, or any other part of it, and that the commission when it went to negotiate with West Virginia, was bound by the provisions of the resolution of March 6, 1894. When it sues it may get less, or get nothing, but it could not negotiate

for anything less without violating the provisions contained in the very act under which it held its position.

Now it has been said here to-day that Virginia has made repeated efforts to settle this debt, and the statement has been made that West Virginia made no response.

MR. CHIEF JUSTICE FULLER: Has West Virginia made any effort?

MR. CARLISLE: I will show that she has, if I may be allowed to do so. The statement was made this morning that Virginia appointed a commission, and that the commission communicated with the State of West Virginia and could get no response. I have here the whole official correspondence between the authorities of the two States on that subject.

MR. ANDERSON: That was appointed in 1894.

MR. CARLISLE: I am going back to 1871. In 1871 West Virginia appointed a commission, and it promptly sent a communication to the Governor of Virginia stating that it had been appointed, and was then assembled to take up the matter and adjust it; but the Governor declined to do anything. Here is the correspondence.

MR. CHIEF JUSTICE FULLER: Had we not better have all of these facts put in?

MR. CARLISLE: I allude to it only because it was brought in here in the argument this morning.

MR. ANDERSON: But what I referred to was in 1894.

MR. CARLISLE: After Virginia had assumed only two-thirds and had declared that West Virginia was liable for one-third, that State refused to negotiate with her on that basis. But West Virginia went further in 1871, and she asked that the account be furnished by Virginia, but that State declined to do so, all of which is shown in the correspondence.

MR. CONRAD: The facts were that she asked Virginia to furnish the commissioners with copies of the record from the Auditor's and the Treasurer's offices, and Mr. Rogers told them that they had no clerical force with which to furnish those copies, but that they might send clerks there and the books would be opened.

MR. CARLISLE: That is correct. The creditor, the party alleging that other owed one-third of the debt, said: "I will not make out or furnish the evidence of my account against you, but if you are willing to send somebody here at an expense of several

thousand dollars to copy the accounts and vouchers and find out what you owe me, I will give you permission to do so." That is the position taken by Virginia.

Now, if your Honors please, certificates were issued under all of these acts to which I have referred, and the exhibits filed with the bill show the amount.

MR. JUSTICE WHITE: You said just now—and I am trying to get at what is in the record and what is not in the record—something about an express agreement waiving the claim against Virginia. Is that in the record?

MR. CARLISLE: It is in the statutes, in the certificates and in the contract, and I am looking now, if your Honor please, for the statement of the amount of certificates issued; but I can state it approximately from memory. There was a little over \$18,000,000 of these certificates issued, which shows that the State of Virginia funded about \$36,000,000 as her share of the debt and interest. There were issued under the act of 1871 certificates to the amount of about \$15,000,000, and over \$10,000,000 of those certificates have been deposited with the commission under the contract releasing Virginia. They were first deposited with Brown Brothers & Company, who were the custodians appointed by the holders of the certificates, and afterwards taken away from Brown Brothers & Company by the Virginia commission, and are now held by them. Over \$10,000,000 of the certificates of 1871 have been deposited under the contract, which your Honors will see, as the Attorney General has said to-day, absolutely released Virginia, whether she ever gets anything from West Virginia or not. There was altogether in the hands of the commission on the 6th day of January, 1906, between thirteen and fourteen million dollars of the certificates issued under the funding acts. The others are held by Virginia herself or her sinking and literary funds, or are outstanding in the hands of the original holders of the bonds or assignees, for they have been sold in the market and speculated upon for a great many years; but Virginia sues in this case not only for the benefit of those who have deposited their certificates, but under the act of March 6th, 1900, she sues for a settlement for the benefit of all certificate holders; so that it makes no difference on the question of trusteeship how many bonds have been deposited with the commission. It might make a difference ultimately, but not in the argument on this demurrer. If there are some of the certificates of 1871 still outstanding, and the court should hold that Virginia has not been released from them,

she might have a claim in her own right for them if she could maintain action for contribution against West Virginia before she has paid more than her own share, which we think she cannot do.

Now the State of Virginia, as I think this record shows conclusively, is released from the whole of the debt, except what she has assumed to be her share. The State of Virginia, suing upon the compact, or suing to recover in accordance with the general rules and principles of equity for an adjustment and apportionment, cannot divide the claim into several parts, and sue for her own alleged share, or part, of West Virginia's liability, and sue for somebody else for another part. Whatever West Virginia's liability is in this matter must be ascertained, as we insist, in the manner prescribed by the compact, and it must be ascertained *in solido*. It is one single liability; but Virginia comes now, in the bill and in the argument, and attempts to split it into different parts, alleging that she sues in her own right on account of some certificates, and for the benefit of others in regard to other certificates. That cannot be done; this is one entire claim, not an indebtedness upon the part of West Virginia to each separate creditor. The compact was made between the two States alone, and not between them or either of them and the creditors. Virginia alone was the original creditor, whose bonds have gone into the hands of the public; and whatever changes may have taken place in her constitution or government, whatever changes may have taken place in her territorial area, she remained the same political entity, and continued to be bound by the obligations just the same as if no change had been made. West Virginia's obligation was to Virginia until that State was released, and not to the creditors. I was surprised to hear the argument made this morning and yesterday that one of the objects of this suit was to secure exoneration for the State of Virginia. So far as I am aware, this is an entirely new ground for the exercise of equity jurisdiction. Certainly it cannot constitute a ground for relief when the parties to whom the obligation is due are neither plaintiffs nor defendants in the suit. If Virginia owes the debt, or any part of it, no court has the power to exonerate her until she pays it. If she does not owe the debt, then there is no necessity for an exoneration by the court. If she has been released, she needs no exoneration; and if she has not been released, this court cannot exonerate her until she pays the debt; and even if it could, it would not do so in a case where the persons to whom she owes the debt cannot be heard except through her as their trustee.

Now, if your Honors please, a word as to the compact. And here I wish to say that counsel has fallen into singular error in the discussion of this question. They speak as if the consent of the Legislature of Virginia was necessary to make the compact valid. There are two provisions of the constitution of the United States which have a bearing upon the question. One is found in the first Article of the constitution, which provides that no State shall enter into a compact or agreement with another State without the consent of Congress. The other is found in the Fourth Article of the constitution, which provides that no State shall be created out of part of the territory of another State, or within the limits of another State, without the consent of the legislature. The legislature is not mentioned in the provision of the constitution in regard to compacts; and this compact was made by the sovereignty conventions of the two States. All the legislature did by the act of May 13th, 1862, was to comply with the provision of the United States Constitution which requires the consent of the legislature to a division of a State and the formation of a new State within the old jurisdiction. If this compact was not made by the two sovereignty conventions, it was not made at all. The legislature, when it passed the act of May 13th, 1862, however, consented to the division of the State under the constitution which West Virginia had formed and presented, and which was then before Congress on her application for admission into the Union; and Virginia in that act instructed her Senators and representatives to vote for the admission of the State. Since the recess, counsel has brought in what he calls a new constitution of West Virginia which he says was adopted in 1863. He says that West Virginia was not admitted into the Union under the constitution to which the legislature of Virginia had consented, but under the amended constitution of 1863; but if you will examine the so-called new constitution, you will find that it is, so far as this subject is concerned, identical with the constitution which was pending before Congress when Virginia passed the act of May, 1862. Congress, it will be remembered, required West Virginia, before admission into the union, to make a provision prohibiting slavery within the limits of the State; and the people of the State did that. They assembled in convention, struck out from the constitution the original provision on that subject, and inserted one prohibiting slavery in the State; and the State was admitted under that constitution by proclamation issued by Mr. Lincoln on the 20th of June, 1863, in accordance with the act of Congress.

Now let us look at the compact. I am not going to discuss the question at length, or recite the circumstances under which it was entered into. All the political departments of the government have recognized the convention assembled at Wheeling in April, 1861, as the convention of the State of Virginia. That convention proposed that a new state might be formed to be called the State of Kanawha, to include certain counties, and that the new state should assume its just proportion of the public debt of Virginia as it existed on the 1st day of January, 1861, to be ascertained, as stated in the ordinance, by charging to the new state all the money expended within her limits—within the limits of that territory—since any part of the debt was contracted, and with her just proportion of the ordinary expenses during the same time, and crediting the new state with all the money that had been paid in from that territory during the same period. That was Virginia's own proposition to the new state. Of course there was no state of Kanawha at that time, and therefore there was no second party to the proposed contract; but subsequently the people within that territory assembled in a sovereignty convention, and then for the first time they had a right, and the power, to consent or dissent from the proposition that Virginia had made. It was still open; it had not been withdrawn; and the new state accepted it with these additions: that the amount of the debt should be ascertained by the legislature of the new state as soon as practicable, and that it should establish a sinking fund sufficient to provide for the payment of the interest and the redemption of the principal within thirty-four years.

MR. JUSTICE HOLMES: Where are the words with regard to these two matters to be found? I have looked for them but I do not find them.

MR. CARLISLE: They are in my brief, if your Honor please.

MR. MAY: On pages 4 and 5 of the bill they will be found.

MR. CARLISLE: Now those two documents constituted the compact, provided the State of Virginia, through her legislature as required by the constitution of the United States, should have given, or should thereafter give, its consent to the formation of a new state. That consent was given after the name of the proposed new state was changed to West Virginia. The ordinance of the Wheeling Convention was well known; it was a public act, and it was before Congress upon the application of West Virginia for admission to the Union. The constitution of West Virginia, in which the proposition

of Virginia was accepted with the conditions I have stated, was before Congress, and that body admitted the state into the Union, and thereby, according to the decisions of this court in the case of *Green vs. Biddle*, and the case of *Virginia vs. West Virginia*, Congress affirmed all that had been done between the two States; and as said by this court in the case of the State of *Pennsylvania vs. The Wheeling Bridge Company*, the compact became a law of the Union, and it has therefore all the force and effect of a statute constitutionally passed by the Congress of the United States.

Now if your Honors please, that ordinance is binding in whole, or not binding at all; every part of it is binding or no part of it is binding. The gentleman certainly conceded before the recess that the ordinance was valid. The ordinance alone could not constitute the entire compact; for, as I said, it was completed only when the State of West Virginia, in its convention, accepted the obligation to pay a just proportion of the public debt, and provided the conditions and terms upon which she would accept and pay it. Now the gentlemen, as I infer from the arguments made here, are willing to stand on the ordinance, but they deny that the parties ever intended to allow the legislature of West Virginia to adjust the matter, or if they did, they say it was unjust and unreasonable; but that was a matter for the parties to contract about, and they did contract about it. If this ordinance is valid, and I assume that this court cannot say it is not valid, because if it does, then, as was said in the case of *Green vs. Biddle*, West Virginia is not in the Union—

MR. JUSTICE HOLMES: Would it be beyond the possibility of argument if you should say that the circumstances did not constitute such compact as you say it did?

MR. CARLISLE: I do not see how such an argument could be properly made.

MR. JUSTICE HOLMES: The question would arise in my mind: Supposing that there were no compact there, whether any and what principles could be applied; and whether or not the principle that was suggested by the Attorney General might not be applicable, that is to say, that presumably upon such a separation, your clients should assume their proportion of the debt equal to the ratio of the taxable property in their part of the State, as compared with the taxable property of the other part of the State?

MR. CARLISLE: If the compact was not valid, I do not see how

the Court can hold that West Virginia was constitutionally admitted into the Union.

MR. JUSTICE HOLMES: I am not intimating that the compact is invalid, but it seems to me, is it not possible to doubt whether the purposes you advert to constitute a compact or contract?

MR. CARLISLE: If there is no compact—and, omitting for the purposes of the discussion the proposition that I have made that West Virginia is not in the Union—then the basis of settlement suggested by the Attorney General of Virginia would be so manifestly unjust to the State of West Virginia that I do not think the court would entertain it for a moment. His suggestion is that West Virginia should continue to impose taxes; that is the theory that the same proportion of taxes should be collected in West Virginia as in Virginia, to pay off the old public debt, leaving Virginia in possession of nine-tenths, if not more than nine-tenths, of all the public works and property of every kind procured by the expenditure of the money realized from the issue of the bonds. West Virginia, a separate and independent State, would go on and pay, along with Virginia, for all the public property, although not one-tenth of it might be located within her boundaries.

MR. ANDERSON: You misapprehend me, Mr. Carlisle. I said that as West Virginia has the assets, the property should be adjusted equitably.

MR. CARLISLE: How can West Virginia get any of the canals or turnpikes or other public works that Virginia has? They are there, and Virginia must keep them.

MR. MOLLOHAN: They have sold to the railroads.

MR. CARLISLE: It is an impossible proposition to be carried out; Virginia has got the property, and it cannot be taken away from her. Now, if your Honors please, when this ordinance was passed, and when the constitution of West Virginia was adopted, the amount of the public debt was known, approximately at least, to all the parties, and it was understood, as it is alleged in the bill, to be about \$33,000,000; it was agreed between the parties that, without going into the question of the expenditure of public money for public works in Virginia, if they would charge West Virginia with the money expended in her territory during the period concerned and with her ordinary share of the expenses of the State and credit her with the money she had paid in, the result would show what

was her just proportion of the public debt existing on the 1st day of January, 1861.

All that your Honors have heard today and yesterday about how the borrowed money was expended, in the construction of turnpikes and canals and railroads leading to or over the Appalachian Range of Mountains, is utterly foreign to this case. It does not make any difference if Virginia threw this money realized from the bonds into the Atlantic Ocean. West Virginia has agreed, and Virginia has agreed, that they will make the calculation on the basis set forth in that ordinance, and that the result will show what proportion of the debt West Virginia should assume, a debt which they knew all about. The amount of the debt and the purpose for which it was created have nothing whatever to do with the settlement under the terms of the ordinance. They are not factors in the problem submitted under that agreement. The only questions here are how much money was expended within the limits of West Virginia, how much was her just proportion of the ordinary expenses of the State, and how much had she paid in. When these three items are ascertained, you will have her share of the public debt according to the agreement.

Now what have Virginia and her creditors done? Without consulting West Virginia, they have created a situation in which the plan agreed upon by the States for the ascertainment of West Virginia's just proportion of the public debt cannot be executed without the grossest injustice to that State. It was agreed, as I have said, that West Virginia's just proportion of \$33,000,000, the amount stated in the bill, would be ascertained in the manner I have stated. Of course that assumed that the State of Virginia would pay the \$33,000,000. But Virginia has adjusted, I think one of the exhibits here shows, about \$21,000,000 principal and interest. But I do not care whether it is fifteen or twenty-five million, or any other sum less than the entire debt, for if you carry out the terms of the compact on which the parties both agreed, West Virginia will be required to pay to Virginia just as many dollars as she would have been required to pay in case Virginia had paid a hundred million dollars on her debt. This is so, because the amount of the debt cuts no figure whatever in making the adjustment. They knew the amount of the debt, and they agreed upon the basis of settlement. West Virginia will be required to pay exactly the same amount to Virginia, who has adjusted only two-thirds of the debt, as she would have been required to pay if that State had paid all of it; and that

situation has been created by Virginia and her creditors without the consent of West Virginia.

I am not able to argue this case on any theory except that the compact is valid, because I do not see how the court can ignore it entirely and undertake to adjust the matter between the two States upon the general principles of equity or international law. I cannot see what other theory the court would adopt. Virginia arbitrarily took the position that the State of West Virginia was liable for one-third upon a rule that she had established herself; and one of her commissioners, Mr. Harrison, went down and talked to the legislature of West Virginia about the debt and tried to convince it that the State was bound to pay one-third of it, and insisted that the State was equitably liable for that proportion, because, he said, the formation of the State of West Virginia had deprived the State of Virginia of about one-third of her territory and about one-third of her white population. This contention was founded upon a supposed rule of international law that the States would be liable according to the proportion of territory and the proportion of population detached from the old State; and that has been Virginia's position since the year 1871. In that year Virginia repudiated the compact by her statute, as your Honors will see, and from that time on, during a period of thirty-six years, she has constantly and persistently refused to recognize the contract or to settle with West Virginia on the terms of the contract.

MR. CONRAD: She refuses owing to her innocence of any such contract. She never heard of it. I never heard of it.

MR. CARLISLE: The compact has always been a matter of public record, and besides it was based on Virginia's own proposition. Now let us see if there is any injustice in allowing the legislature of West Virginia to adjust this matter. We were asked yesterday by one of the members of the court whether West Virginia denies that she is liable for any part of the debt. Of course I am not here with authority to speak for West Virginia as to what she will do hereafter. We are here to show the court, if we can, that there is no judicial tribunal in this country that has the power to coerce the legislature to act; that the legislature alone has the power to adjust and pay the debt, and that Virginia has no cause to complain because it has not been done. Virginia, as shown by the bill, has in her own possession and under her control, every account, every voucher, every document, every particle of evidence necessary to make the adjustment, and she has never furnished West Virginia

with a scrap of paper or made any demand on the legislature of that State to adjust the debt in accordance with the compact; and yet Virginia makes the complaint that West Virginia, the debtor, has not followed her up and endeavored to get a settlement with her, when the debtor has not a particle of evidence upon which she could ascertain the amount of the liability. Let the creditor make out her account; let her prepare the papers in her own possession and send them to West Virginia and demand a settlement as provided in the compact. If West Virginia refuses, that will be time enough to make a complaint against her.

MR. JUSTICE HOLMES: I have seen it somewhere in these papers, but I cannot keep the run of them—I have seen a statement somewhere here that the West Virginia legislature has repeatedly denied any liability whatever.

MR. CARLISLE: I think that is a fact, your Honors, since Virginia made the adjustment with her creditors and paid only her own share of the debt; but I will come to that presently.

MR. JUSTICE HARLAN: Why do you say that an adjustment if now made under the compact would be unjust to West Virginia?

MR. CARLISLE: This obligation is from West Virginia to Virginia, and under the situation that now exists a settlement under the terms of the ordinance, which prescribes the method of adjustment, would require West Virginia to pay precisely the same amount of money that she would have been required to pay to the State of Virginia if that State had paid the entire \$33,000,000 of her debt and all the interest upon it.

MR. HOLMES: She could not pay more than her just share.

MR. CARLISLE: She is to be charged with certain items and credited with certain items according to the ordinance, and that is the end of it. But Virginia has repeatedly declared that she would not settle according to the ordinance, but would merely ascertain what the public debt was on the 1st of January, 1861, and divide it by three. A school boy could have made that settlement. If the debt was \$33,000,000, it was declared that West Virginia's share was \$11,000,000, and that Virginia was only responsible for \$22,000,000. Of course West Virginia has refused to agree to that.

Now these States are not co-obligors—

MR. JUSTICE DAY: These States are not what?

MR. CARLISLE: I say these States are not co-obligors; that is conceded by the other side.

MR. ANDERSON: It is a common debt, like that of co-partners.

MR. CARLISLE: No, it is not a common debt. If one man owes a debt, and another man agrees with him, not with the creditor, that he will pay a certain proportion of the debt, or will reimburse him as to a certain proportion when the debt is paid, they are not co-obligors. That is the situation here. The State of Virginia alone owed the creditors; they never had a claim against West Virginia; they never held her bonds; they never had a contract with her; they never had any evidence of an obligation on her part that they could present and demand payment. She has agreed in the compact to assume a just proportion of the debt, but Virginia has arbitrarily settled for herself what West Virginia's portion was, one-third, and she has adjusted the other two-thirds, which she herself has declared is her own just proportion. Now she sues West Virginia and demands a contribution from her. For what? She concedes that she has paid only her own proportion; that she has paid exactly the same amount to the creditors that she would have been required to pay if West Virginia had paid everything now demanded from her; and yet she wants contribution. If they were co-obligors, one of them could not sue the other until he had either paid the whole debt or at least had paid more than his own share. That is well settled law. In the other case supposed, where one man owes a debt and another promises to pay one-third of it, or to reimburse him to the amount of one-third, and the original debtor pays only two-thirds, and has been released, he cannot compel the other to pay him the other third. That is the case we have here; Virginia has decided for herself what her just share was, and she has paid it or adjusted it, and no more. We think—and if this matter is ever adjudicated we are satisfied that the result will show—that Virginia has never paid anything like her just share.

MR. JUSTICE HARLAN: Is this bill broad enough, assuming that we have jurisdiction—with that question out of the way, is this bill broad enough to enable this court to make a decree without reference to this settlement that you speak of, to tax West Virginia for such an amount of the debt as would be a fair amount?

MR. CARLISLE: I think not, because you are bound to abide by the compact. If you disregard the compact, if the court repudiates it—of course I use that word in a respectful sense—then it can settle it upon any principles it may adopt, provided it has jurisdiction, and should find that Virginia has any claim at all; but she has paid no more than her share and has been released,—

MR. JUSTICE HARLAN: That would be a question generally whether she would be entitled to anything?

MR. CARLISLE: Yes, sir.

MR. JUSTICE HARLAN: Is the bill broad enough, if we have jurisdiction, to enable us to make a decree for such sum as would be fair and equitable?

MR. CARLISLE: Yes, if the compact can be disregarded; but we think that is not a supposable case, because the compact was undoubtedly valid.

MR. JUSTICE HOLMES: Under the general principles of equity, under that bill, if it should turn out the other way, that West Virginia was the creditor of Virginia.

MR. CARLISLE: I suppose, if the creditors were parties and should file a cross bill—

MR. JUSTICE HOLMES: I mean, any bill that prays for an amount, does it by implication submit to whichever way it may turn out?

MR. CARLISLE: The counsel on the other side concede very frankly in their brief, in express terms, that this court has no power to enforce a decree against the government of a State.

MR. JUSTICE WHITE: Is there a question here as to the power of this commission to sue?

MR. CARLISLE: The commission has not sued, and could not sue in its name, but the position we take is that there is no authority to use the name of Virginia in a suit, except for the purpose of settling the question of West Virginia's proportion of the debt, and that they have included in the bill other claims.

MR. JUSTICE WHITE: Suppose we put the compact out of the way. Suppose that, merely; let us suppose that is out of the way. You proceed on the assumption that the State of Virginia has the right to remain liable, and as the result of liquidation suppose you would find that West Virginia's share was only the one-twentieth of this debt; then the decree would be against Virginia for a much larger proportion of this debt than she assumed to pay. Does the resolution authorize the parties to accept judgment?

MR. CARLISLE: Not at all. The act under which the suit is instituted, provides expressly that Virginia shall be released, no matter how small may be the amount collected from West Virginia, or

if nothing shall be collected from West Virginia. That has been very distinctly stated in the act, and in the contract with the depositors.

MR. CONRAD: All that proceeding contemplated was a settlement with West Virginia. That failing, they have recourse to the courts. Now if we invite West Virginia here by a bill for an accounting, and an account is stated, and a balance is found to be due from Virginia to West Virginia, we proceed on the theory that inasmuch as we have invoked the jurisdiction of the court, a decision should not be given against West Virginia.

MR. JUSTICE WHITE: If, instead of a settlement between the creditors by Virginia and the commission and the issuance of certificates, it turns out that the certificates were issued for a much less proportion than Virginia owed, would not the creditors undo that settlement and make Virginia liable?

MR. CARLISLE: I think they ought to do it. Your claim (addressing Mr. Conrad) has been that Virginia has not been released.

MR. CONRAD: No, it is not.

MR. CARLISLE: Then the idea of Mr. Justice White is perfectly correct, and there ought to be a decree against Virginia for the remainder, if the adjustment was not correct, but of course that cannot be done in this case.

MR. JUSTICE HARLAN: A decree against Virginia in whose favor. The creditor is not here.

MR. CARLISLE: Certainly not, and I have not said it could be done in this proceeding, but only that the creditors ought not to be bound by the adjustment.

MR. JUSTICE HARLAN: The court has nothing to do with the bondholders?

MR. CARLISLE: No, but Virginia would have.

MR. JUSTICE HARLAN: The money would be collectible by Virginia if she got a decree in this case?

MR. CARLISLE: Yes, and she would pay it over to the committee representing the holders of the certificates, and the committee has provided for a tribunal to distribute it.

MR. CONRAD: Virginia is not suing her bondholders.

MR. JUSTICE DAY: What weight, if any, would attach to the compact if any action had been taken on it? You have stated it that way—

MR. CARLISLE: I have stated, your Honor, that West Virginia, as far back as 1871, appointed a commission to make the settlement under the compact.

MR. JUSTICE DAY: Does that appear in the bill?

MR. CARLISLE: I made that statement outside of the record in response to a statement made by the other side, which was also outside of the record.

MR. JUSTICE DAY: This stands on a demurrer to the bill?

MR. CARLISLE: Precisely.

MR. JUSTICE DAY: What weight, in your view, has this?

MR. CARLISLE: I do not suppose that the court could consider this outside matter at all, and I have merely alluded to it here—

MR. JUSTICE DAY: What weight, if any, could be given to what has been done by the Virginia legislature under the so-called compact?

MR. CARLISLE: The complaining creditor has never made any account or demand upon the legislature of West Virginia to settle according to the compact; but counsel has stated that she tried to negotiate with the alleged debtor, but could get no response, when it appears by the record in the case that the compact has been repudiated by Virginia for thirty-six years.

MR. CONRAD: We never heard of it.

MR. JUSTICE DAY: If it does not exist, then by common consent they cannot act upon it.

MR. CARLISLE: The bill alleges that Virginia has tried to negotiate; but how and when? We only know from her statutes and resolutions the terms and basis upon which she tried to negotiate, that is upon the basis that West Virginia owed one-third.

MR. ANDERSON: The last proposition was unconditional.

MR. CARLISLE: No, it was not unconditional. Mr. Harrison's speech before the legislature of West Virginia is made part of the bill, and the court can look at it. He tried to show by argument that West Virginia owed one-third. The vital question in this case is whether the court has jurisdiction. The time allowed will not enable me to argue this question fully; but I think it is not necessary to argue the question as to the jurisdiction of the court to entertain a suit brought by a State as trustee.

MR. CHIEF JUSTICE FULLER: We know about that.

MR. CARLISLE: On the other hand if it appears that Virginia has filed this bill in her own right, and has no interest whatever in the alleged claim, that would dispose of that part of the proceeding. Now, what is jurisdiction? As I understand it, jurisdiction is the power to hear and determine causes between parties who are properly before the court, and to render decrees and judgments, and enforce them. This court does not sit—no court sits—merely for the purpose of ascertaining and declaring what the legal and equitable rights of the parties are, and stop at that point. The powers of a court are remedial, not declaratory; it must render judgments or decrees; it must redress wrongs; it must enforce rights, and it can have no jurisdiction of a case in which it cannot do these things, or some of them. There has been a good deal said here to-day about the meaning of the word "controversy." That word does not appear in that part of the constitution which confers original jurisdiction upon this court in cases where a State shall be a party. It appears only in that clause of the constitution which defines the judicial power of the United States. When we come to the clause that confers original jurisdiction upon this court, it speaks of a case, not a controversy, where a State shall be a party. But I suppose that is not very material, because the court can take no jurisdiction of a controversy until it has assumed the form of a case. A case must be made, and there must be parties, subject to judicial process; there must be judicial proceedings, and there must be a judgment or decree and an execution.

The word "jurisdiction" as used in the constitution must be understood to mean now just what it was understood to mean when that instrument was adopted. It means, as I have said, the power to hear and determine the cause, to render judgments and decrees, and enforce them by judicial process of some kind or other. Bouvier, and Black, and all the other elementary authorities, and law dictionaries, sustain this definition. Blackstone says in the first volume of his commentaries, on page 242 of Cooley's edition:

"All jurisdiction implies superiority of power. Authority to try would be vain and idle without an authority to redress, and the sentence of the court would be contemptible unless the court had the power to command the execution of it."

This court has said in the case of *Riggs v. Johnson County*, reported in 6 Wallace, in an opinion by Mr. Justice Clifford:

"Want of jurisdiction in the Circuit Court was not alleged in the return, nor was any such ground assumed by the

circuit judge who refused the writ. Experienced counsel, however, have made that point in this court, and it becomes the duty of the court to determine it before examining the merits. Jurisdiction is defined to be the power to hear and determine the subject-matter in controversy in the suit before the court, and the rule is universal, that if the power is conferred to render the judgment or enter the decree, it also includes the power to issue proper process to enforce such judgment or decree.

"Express determination of this court is, that the jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until that judgment shall be satisfied. Consequently, a writ of error will lie when a party is aggrieved in the foundation, proceedings, judgment, or execution of a suit in a court of record.

"Process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution. Congress, it is conceded, possesses the uncontrolled power to legislate in respect both to the form and effect of executions and other final process to be issued in the federal courts. Implied concession also is, that Congress might authorize such courts to employ the writ of mandamus to enforce a judgment rendered in those courts in a case where the ordinary process of execution is inappropriate, and where the judgment creditor is without other legal remedy."

I have quite a number of authorities to cite on this point, but it is elementary that a court will not exercise, or attempt to exercise, jurisdiction unless it can enforce its judgment. Now if this claim is to be determined upon the compact, the court, in order to enforce whatever judgment it may render that will afford relief, must discover some process heretofore unknown and exercise some power heretofore not recognized, to compel the legislature of West Virginia not only to proceed to ascertain the amount of the State's obligation, but to establish a sinking fund sufficient to pay it, for that is what the parties have agreed to.

MR. JUSTICE HARLAN: Suppose a State sued another to recover a tangible piece of property, and judgment was given in its favor by the court: could the court by its process compel the delivery of that property?

MR. CARLISLE: I think that might be done, unless the property was used, or intended to be used, for public property, because that is something the court could do without disturbing the operations of the State in the least.

MR. JUSTICE HARLAN: If there is a suit to recover specific bag of money, it would have jurisdiction to do that?

MR. CARLISLE: I am not called upon to deny that, in this case; but if the money had been collected for public purposes, or was held for the public use, I do not think it would make any difference whether it was in a bag, or loose in the treasury, or deposited in a bank; no court could seize it and apply it to the payment of a judgment, unless the legislature had appropriated it for that purpose.

MR. JUSTICE HARLAN: Your contention broadly is that when the constitution was framed, the men who framed it gave extraordinary jurisdiction only in certain cases, and did not intend to give the court jurisdiction in suits to be brought by one State against another to recover money. Suppose it was a suit to get a will construed?

MR. CARLISLE: In that case the court would give all the remedy the nature of the case required. In the case of a will, the only remedy necessary would be to construe it for the instruction and guidance of the parties concerned. If a suit is brought for the recovery of a specific article of property, unless it is public property it can be seized, and its seizure would not interfere with the legislative or executive authority of the State, or with the autonomy of the State, and will not disturb the relations between the State and the general government under the Constitution.

MR. JUSTICE HARLAN: If you should find some property owned by the State, could an execution be levied upon it?

MR. CARLISLE: I suppose it probably could, unless it was public property; I would not question that. But my contention is that the court cannot enforce the compact without taking control of the executive and legislative departments of the State of West Virginia, and compelling the legislature to adjust the account; and then if the court complies with the compact, it must compel the legislature to pass an act, and the governor to approve it, establishing a sinking fund. That is the way in which the debt was to be ascertained and paid.

But suppose the compact is abandoned, what would the court do? It has been settled in so many cases that I will not undertake to enumerate them—they are recited in my brief—that this court cannot levy a tax; that it cannot compel the State authorities to issue bonds, that it cannot compel them to appropriate money, or to

exercise any other constitutional function committed to their judgment and discretion. As far as this court can go, is to compel a municipal or ministerial officer of a State to perform some duty which the proper authorities of the State have already authorized him to do, or required him to do. The cases on this subject are numerous, beginning with *Rees v. Watertown*, and coming down to a very recent period, in which this court has used the very strongest language in denying its jurisdiction to interfere with the constitutional authorities of a State. I contend that some construction must be put on the constitutional provisions which will not derange the relations between the general government and the States, which the constitution itself establishes. If you give a judgment or decree in this case for money, in what other way can it be enforced? It is conceded here that West Virginia has no property except public property; it has no private property—

MR. ANDERSON: We said we know of none.

MR. CARLISLE: But it is said that this court has heretofore decided this question. I think not. The court has held over and over again that it could entertain an action to adjust the boundaries between two States; but in such cases no judicial process is necessary to execute the judgment of the court. When a court has determined what the true boundary line between two States is, the political departments of the country, State and Federal, respect that decision.

MR. JUSTICE WHITE: Now right there, Mr. Carlisle; It has often been said that, prior to the adoption of that provision of the constitution and the creation of this jurisdiction, sovereignty existed in these States; sovereignty existed in them prior to the formation of the constitution, and in the ultimate course of things if that jurisdiction could not be enforced by the courts there must be war, and the purpose of inserting that provision in the constitution, the States, being deprived of all power of waging war against each other, was to create some tribunal, not in the narrow sense of litigation between parties, by which the ultimate solution of all these great controversies could be determined without recourse to war. Now did not that proceed upon the theory that if the States entered into the constitution and if they consented to the constitution, they would respect the judgment of the tribunal which the constitution created, and therefore in testing the power, you were not to determine it by the narrow rules by which you determine whether the court has the power over an individual?

MR. CARLISLE: I know, if your Honor please, that has been the argument always.

MR. JUSTICE WHITE: You say the States would respect a decision of this court with respect to a boundary?

MR. CARLISLE: Yes; they cannot do otherwise.

MR. JUSTICE WHITE: Why would they not respect a decision otherwise?

MR. CARLISLE: In the case of *Kentucky v. Dennison*, it was expressly held by the court that under the constitution of the United States and the act of Congress, it was the constitutional duty of the State of Ohio, through her governor, to surrender fugitives from the justice of other states of the union. The governor of Kentucky made a demand upon the governor of Ohio for the surrender of a fugitive from justice, the governor of Ohio refused to obey it, and an action was brought in this court, and the court held, in the strongest language, that although it was the duty of the State of Ohio to comply with that demand, there was no power in the court to compel it to do so.

MR. CONRAD: That was put upon a political ground.

MR. CARLISLE: No; upon the ground that although it was a solemn constitutional duty, the court had no power to enforce its performance, and it refused to give any judgment in the case, as it has also done in many other cases—because it could not enforce its judgment—Now I do not dissent entirely from the argument stated by Mr. Justice White, that one of the purposes of the constitution in conferring original jurisdiction upon this court was to prevent angry controversies and conflicts between the states. Still that does not militate at all against my position, that some construction must be put upon it that will accomplish this purpose, and at the same time keep the hands of the general government off the authorities of the States in the exercise of their constitutional powers, and in the discharge of their constitutional duties. The court can order the seizure of a piece of property, unless it is public property, without disturbing the relations between the States, or the relations between the States and the general government. It can seize money in a bank, if it is not held for public purposes, if found there, without disturbing the relations existing between the States or between the States and the general government; but if it undertakes to enforce a judgment for money against a State where there is no lien or trust, a plain, naked demand for money, which must be paid and sat-

ified, either by the appropriation of the money or property of the State, or by exercising authority and control over its legislature and compelling it to act affirmatively, it is a very different thing from a proceeding where the remedy consists in restraining somebody from doing a wrong.

As I said, in the case of a controversy about boundaries, when a line has been established by this court and a survey has been made and marked, then all the courts of the country, all the political authorities of the State that has lost the county, as well as all the political authorities of the United States, regard the territory as constituting a part of the State to which it has been awarded. Congress will include it in the congressional districts of that State, and in the judicial districts of that State. The Executive Department of the United States, in exercising its duties with regard to the relations between the general government and the States, would treat it as a part of that State, and there is no power anywhere that can undo what this court has done.

In cases like *Kansas vs. Colorado*, and *Missouri vs. Illinois*, the Court has jurisdiction, not because it can compel the State authorities to act affirmatively, but because it can restrain the agencies of the State from continuing their wrong doing. In cases involving questions of boundary, it is the duty of the State, as a State, as a political organization clothed with the power and charged with the duties of government, to protect its area from encroachments on the part of another State, and that is done by appealing to the original jurisdiction of this court to establish the boundary. It is its duty as a State to protect its people against nuisances and the trespasses and other wrongs done to them by another State or by its authority. These are duties which belong to a State because it is a State, because it is the guardian and the protector of its people and their rights, their lives, their health and their property. But when a suit is brought merely for the recovery of money, the State stands exactly like an individual so far as her rights are concerned; and she cannot recover money in a case where an individual cannot recover money under the same circumstances. If the jurisdiction is extended to that class of cases it will be going beyond the intention of the framers of the Constitution.

In the case of *United States vs. North Carolina*, which was a suit to recover the interest on bonds, the State appeared in the court, and in writing which was made part of the record, voluntarily submitted to the court the only question there was in the case. There

was no question of fact, and only one question of law. This court has held more than once that the right of a State to be exempt from a suit is a personal right which may be waived, and North Carolina did waive it in the case referred to. In the case of *United States vs. State of Michigan*, the court found, after an examination of the statutes, that the State of Michigan held certain funds and certain tools and implements appertaining to the St. Mary's River Canal in trust for the United States, and so it decided that it could enforce the trust.

MR. CONRAD: That was not by law, it was by legal action.

MR. CARLISLE: The court decided there was a trust, and said that, under the act of Congress providing for the construction of the canal, the State became a trustee for the United States in the expenditure of the money for the purchase of the property. In the case of *South Dakota vs. North Carolina*, which is the next case relied on, there was a lien. This court held—it was decided by a divided court—that it had original jurisdiction to entertain that suit, to the extent of enforcing the lien at least, and it enforced the lien by decree, and ordered a sale of the stock; but it expressly reserved the question as to whether it could render a judgment for the deficiency. His Honor, Mr. Justice Brewer, delivered the opinion, and he cited various cases which showed the difficulty of proceeding in such a matter as that, and reserved the question. It was never decided by the court, because the parties settled the case between themselves; so that, to say the very least, this question is still open in this court. It is a question which the court, if it entertains jurisdiction, will have to decide in this case if it holds that it will not regard the compact between the parties; and if it regards the compact, it will have to compel the legislature of West Virginia to adjust her proportion of the public debt and establish a sinking fund to pay it. If it decides to adjudicate the case outside of the compact, the only decree that can be rendered would be a decree for money to be enforced by the ordinary process of execution. In view of the fact that the court has considered this question so often heretofore, and that it has been so often argued in previous cases, I have attempted to do no more than state our position.

Can the court entertain this action for an account? That is the only feature in the case that gives it the least appearance of an equitable proceeding. Virginia has all the accounts, and the claim arises upon a contract, plain and simple. No discovery is asked for, and none is necessary. There are no mutual accounts, and I think

it is well settled that a court of equity will not entertain an action for an account in such a case as this, unless a discovery is necessary. If a party cannot proceed at law because he is not in possession of the information necessary to enable him to do so, and that information is in the possession of his adversary, he may appeal to a court of equity to compel his adversary to disclose the facts; and then the court, having obtained jurisdiction of the case on account of that equitable ground, will proceed to decide the whole matter between the parties. It is stated in all the elementary works, and sustained by abundant authorities, that there is no jurisdiction to order an accounting where there is no mutual accounts between the parties, unless a discovery is necessary, except in cases of trusts, partnerships and a few others. Story says that when, in such a case, a discovery is asked for and is not granted, the court will not order an accounting.

No discovery is required here, and an action at law can be brought for contribution, and a judgment at law for the recovery of the amount due would be just as effectual as a decree in equity. This court has held that the mere fact that the evidence is complicated or tedious constitutes no ground for proceeding in equity on a legal cause of action.

I have not said anything concerning the two Virginia statutes passed in 1863 under which claims were made in the bill, and I do not think it really necessary to do so, because that question has been fully discussed by my associates and by me in the briefs. I will say, however, that the act of February 4, 1863, simply appropriated to West Virginia certain money, which, as the court will see from the act itself, had been previously collected from the counties which constituted that State; and the act contains no provision requiring West Virginia to account for the money, or any part of it. It would have been absurd to ask that West Virginia should account for it, because it was her money. The other act transferred to West Virginia certain public properties located within the boundaries of the proposed new state, and declared that it should be accounted for by West Virginia "in the settlement hereafter to be made with West Virginia." What settlement was meant? Undoubtedly the act referred to the settlement to be made under the compact, for that was the only one that had been provided for. In that settlement West Virginia was to be charged with the money expended within her limits during the time the debt had existed, and with her just proportion of the ordinary expenses and credited with the money

paid into the treasury of the State of Virginia during the same period. Now the settlement which Virginia contemplated by the act of February 3, 1863, was the settlement which was to be thereafter made with West Virginia under this compact; and in that settlement West Virginia was to be charged with the money which was expended by Virginia in procuring this very property which the act turned over to her. Virginia now claims that West Virginia should be required to pay her just proportion of the public debt, which includes, of course, the money expended for this public property, and should pay for the property besides, thus imposing a double liability upon that state.

There is another claim for \$25,000,000, including interest at six per cent., set up in the bill, which, as is shown by the bill, was a part of the debt contracted before January 1, 1861, and is therefore a part of the same \$33,000,000 of indebtedness mentioned in the first part of the bill. It is a part of the debt which West Virginia was to assume her just proportion of, and it is nowhere alleged in the bill that Virginia has paid that \$25,000,000, or a single dollar of it, in excess of her own just share. It is not even alleged that she has actually paid it, or any part of it. The allegation is simply that she "has paid or retired it."

It appears, as the court will see when it examines the act of March 6, 1900, under which this suit is brought, that the Attorney General of Virginia was authorized to use the name of the State only for one purpose. This court decided, in the case of *Texas vs. White*, that the Governor of a State might authorize a suit to be brought in its name, but that was an action in which the State, as a State, was interested, not as a trustee, but in her own right exclusively. While that may be the general rule, it does not apply here, because the legislature itself, which is the supreme power in a State, has taken charge of this subject, and has expressly declared for what purpose the suit shall be brought, and has limited the authority which it gave to its officers to that particular purpose; that is, to the institution of a suit to secure a settlement of the claims of the holders of the certificates. That is plain on the face of the act. Ordinarily this objection should be taken by a plea in abatement, but it appears on the face of the bill, and of course in that case it cannot be necessary to file a plea. For instance, in a case where diverse citizenship is necessary to confer jurisdiction, if it appears by the bill of complaint that the litigants are citizens of the same State, or, if it does not appear that they are citizens of

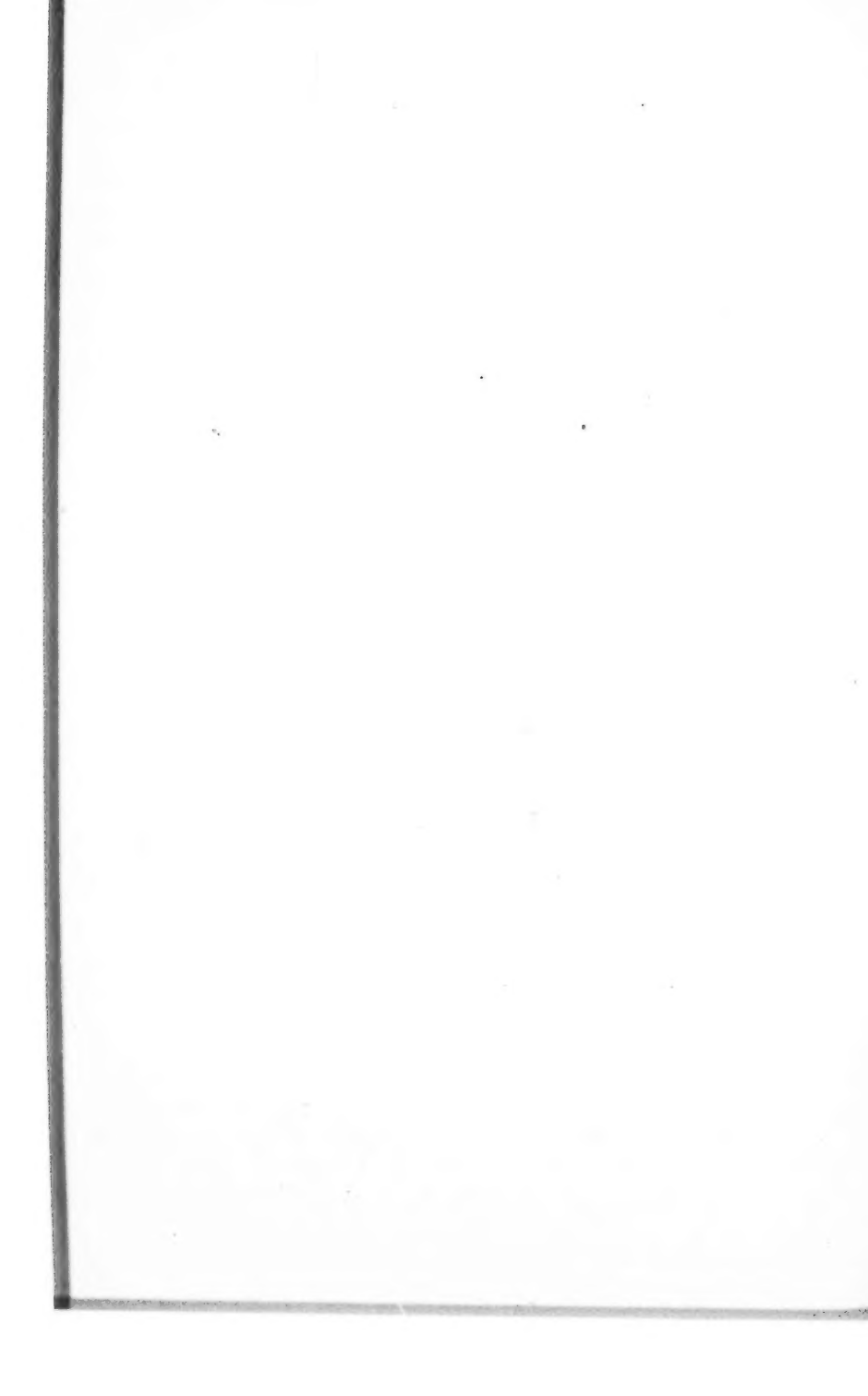
different States, the objection can be taken by demurrer. We submit to the court that the only authority given for the use of the name of the State of Virginia was authority to use it as trustee, and that as trustee she cannot maintain an original action in this court.

As there are only a very few minutes of my time remaining, I will not attempt to present or discuss any other question in the case.

Supreme Court of the United States.

OCTOBER TERM, 1906.

Supplemental Brief of Counsel for West Virginia.



IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

ORIGINAL No. 7.

COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

SUPPLEMENTAL BRIEF ON THE DEMURRER.

The evident purpose of the Virginia funding act of March 30, 1871, was to settle with the creditors for the full amount which the State had decided was her just share of the old public debt, and every creditor who surrendered his original bond for cancellation under the provisions of that act understood that he was being paid in the new bond all that the State recognized her obligation to pay. By presenting his bond for cancellation as required by the statute, and by accepting the certificate representing the remaining one-third, he necessarily released the State from any further pecuniary liability to him; for all the State agreed to do—if the language of the certificate constitutes an agreement—was, that the unfunded one-third “will be provided for in accordance with such settlement as shall hereafter be had between the States of Virginia and West Virginia in regard to the public debt of the State of Virginia at the time of its dismemberment.” Both the act and the certificate issued under it provided that the State should hold the cancelled bonds in trust for the owners of the certificate (Record, pp. 15; 47-48).

The settlement referred to was to be made between the two States

alone, and the essence of the agreement was that if anything should be received from West Virginia the holders of the certificates should have the benefit of it to the extent of their ratable shares. If Virginia had been suable, no action could have been thereafter maintained against her on this agreement unless she had actually received money in a settlement with West Virginia. Money so received would have been held in trust by the State for the certificate holders; and she now sues in that capacity for their exclusive benefit.

Unless Virginia has a valid claim in her own right against West Virginia for contribution independently of her transactions with the creditors, she cannot maintain this action. It certainly cannot be said that the issue of certificates to which West Virginia was not a party could confer upon Virginia a greater or more perfect right with respect to the unfunded one-third than she would have otherwise possessed; and, in fact, it is conceded by counsel that the liability of West Virginia is in no way affected by the issuance of the certificates. Although counsel insist that Virginia was not released from pecuniary liability under the act of 1871, yet the Attorney General, in his reply brief, says:

“While the creditor, as the result of this arrangement, took
“the risk of such a settlement ever being made, it was none
“the less the duty of Virginia to do all that she could, or all
“that could be reasonable and fairly expected of her, to
“bring about and effect such a settlement; and, her repeated
“efforts to that end having proved abortive by reason of the
“failure of West Virginia to meet her overtures, this suit has
“become necessary.”

The next funding act was passed March 28, 1879. It provided for the surrender and cancellation of the outstanding bonds and for the issue of certificates, and expressly declared that “The acceptance of said certificates for West Virginia’s one-third issued under
“this act shall be taken and held as a *full and absolute release* of
“the State of Virginia for all liability on account of said certificates” (Record, p. 19). Notwithstanding this plain provision of the act, it is contended in one of the reply briefs that Virginia was not released from liability for the sums represented by the certificates issued under it. Of course, it was not necessary to provide that the State should be released from any part of the old bonds, because they had all been surrendered to her and cancelled, and no longer constituted, even apparently, an obligation upon her part.

The next act, which was passed February 14, 1882, also provided

for the surrender and cancellation of the outstanding bonds, and for the issue of certificates for the unfunded one-third, to be accounted for by the State of West Virginia without recourse upon "this commonwealth" (Record, pp. 28-29).

The next and last funding act was passed February 20, 1892, and it also required the surrender and cancellation of the outstanding bonds and the issue of certificates for the unfunded portion "to be accounted for to the holder of this certificate by the State of West Virginia without recourse upon this commonwealth" (Record, p. 30).

The foregoing references to the statutes show the relation which the State of Virginia bore to the unfunded part of the debt when the joint resolution of March 6, 1894, was passed constituting a commission to negotiate with West Virginia, upon the express condition, however, that it should "in no event enter into any negotiations thereunder except upon the basis that Virginia is bound only for two-thirds of the debt of the original State, which she has already provided for as her equitable proportion thereof." (Record, p. 40).

This was followed by the act of March 6, 1900, which authorized the commission to take the certificates on deposit "upon an agreement and contract on the part of the holders of said certificates that if the said commission would secure a settlement with West Virginia with respect to said certificates, the holders of said certificates so deposited will accept the amount realized on such settlement from West Virginia on said certificates as a full settlement of all their claims thereunder" (Record, p. 42). And it was further provided that the commission, with the advice and approval of the Attorney General, might take such action and institute such proceedings "on behalf of the State" as might in their judgment be needful and proper to "bring about and carry into effect a settlement as aforesaid;" but it was expressly provided that the owners of the certificates should defray all the expenses involved in connection with the proceedings "and the State shall not be subject to any expense on that account" (Record, p. 42).

The contracts exhibited with the bill, which are set forth in full in our original brief, show that the holders of the certificates which were deposited with the commission agreed to all the terms and conditions of the acts last referred to; and the record shows that before the institution of this suit certificates to the amount of \$13,173,-435.41 had been deposited with the commission. Of this amount

\$10,851,294.09 were issued under the act of 1871 (Record, p. 89). Certificates held by the State of Virginia or by the commissioners of the sinking fund and literary fund amounting to \$2,745,462.01 have not been deposited, of which \$2,578,518.68 were issued under the act of 1871 (Record, p. 90). If Virginia owes any part of the debt represented by these certificates, she owes it to herself on account of the obligations created for her own exclusive benefit, and West Virginia could in no event be responsible for any part of it.

The dissenting opinion of Judge Staples in the case of *Antoni vs. Wright*, 22 Grattan (62 Va.), p. 838, and the cases of *Higginbotham vs. Commonwealth*, 25 Grattan (66 Va.), p. 628, and *Greenhow vs. Vashon*, 81 Va., 341 are cited by counsel in support of their contention that Virginia was not released by the act of 1871 from the obligation to pay the unfunded one-third of the debt. But an examination of the cases shows that no such question was involved, or could have been involved, in either of them.

In *Antoni vs. Wright*, decided in 1872, the question was as to the constitutionality of the Virginia act of 1872, repealing the provision of the act of March 30, 1871, which made the coupons receivable for taxes. The court, in a very able opinion, held that the repealing act as unconstitutional. Anderson, J., in delivering a concurring opinion, said:

"It matters not whether the State is released from the one-third of the debt or not; if a new bond had been given for the whole of the debt, it would have been a valid obligation for a valuable consideration. Whether the State is released or not for one-third of the debt, it is very clear that in this transaction she has only assumed to pay two-thirds of it. And I could not say that she is bound for any more. That question, though one of great interest to the State, is not involved in this case" (p. 873).

We call the attention of the court also to what was said by the court on page 840 of the report.

In *Higginbotham vs. Commonwealth*, decided in 1874, the question was whether the State was bound under certain acts of the legislature to pay dividends on the stock of the James River & Kanawha Company. It was contended by the Attorney General for the State that the two States were bound ratably to the stockholders for the dividends agreed to be paid, and that Virginia was, therefore, released from one-third of it by the dismemberment. The court expressed the opinion that they were bound ratably, but that Virginia was not released, and, speaking of the State's attitude, said:

“By the payment of the whole debt, an equity at once
“arises in her favor to demand contribution from the other
“State which she may enforce in the United States Courts;
“a right secured to States but denied to individuals. She can
“not suffer, therefore, by doing right. Virginia has not lost
“her identity by the loss of forty-eight counties and the in-
“habitants thereof.”

In the course of its opinion, the court further said:

“It is scarcely necessary to add that in what has been said
“above it had not been my purpose to express or intimate any
“opinion as to the respective rights and liabilities of the State
“and those of her creditors who have accepted the provisions
“of the act of March 30, 1871, commonly called the funding
“act. That question is not before us, even incidentally, and
“no opinion is expressed thereon” (p. 636.)

There has been no adjustment between the State and the stockholders who sued in that action, as there had been with the holders of the old public debt, and therefore there was no foundation for the claim that the State had been released from any part of the liability for dividends. The position assumed by the court that West Virginia was liable directly to the creditors for her just proportion of the debt is not insisted upon by counsel in this case. On the contrary, it is conceded that if West Virginia is liable for contribution, it is to Virginia alone.

In 1886, when the case of *Greenhow vs. Vashon* was decided, the entire personnel of the court had been changed as a result of the controversy over the readjustment of the public debt. It was a proceeding to compel the treasurer of the State to receive coupons in payment of taxes, and the court held that he could not be compelled to do so because the funding act of March 30, 1871, was unconstitutional and void!

We think it is clear that Virginia has been released by the provisions contained in the various funding acts, by the surrender and cancellation of the bonds, by the acceptance of certificates under the acts, and by the contracts entered into between the creditors and the commissions; but, even if there had been no formal or voluntary release, the State has repeatedly declared in the funding acts and in the joint resolution of March 6, 1894, and the act of March 6, 1900, under which this action is brought, that she is not liable for the unfunded one-third of the debt. These declarations amount to a positive refusal to pay, or to fund, that part of the debt, and are

therefore equivalent to a direct repudiation of the State's obligation to that extent.

Under these circumstances, what possible pecuniary interest can the State have in the claims alleged against West Virginia? But, no matter whether Virginia has been released or not, and no matter whether she has repudiated the one-third or not, she sues in this action for contribution, and no such suit can be maintained until she has actually paid, or in some way settled, more than her share of what her counsel call the "common indebtedness." She has decided for herself, with the consent of her creditors, what her just share was, and she has neither paid nor extended anything in addition. No authority has been cited, and we are not aware that any exists, showing that one co-obligor—and the States are not co-obligors—can maintain an action against another, either at law or in equity, for contribution, before he has paid more than his own just proportion of the joint indebtedness. The only authority relied upon by counsel on the other side in support of their contention on this point is *1 Spence, Equity Jurisprudence*, p. 662: but that citation has no bearing upon the question.

Speaking of the right to sue for contribution, the author says:

"If one of several sureties paid the whole or more than his proportion of the debt, he might compel his co-surety to contribute proportionately to the amount so paid. So if the original debtor, or one of the parties liable, becomes insolvent, each of the solvent parties was made to contribute to the obligation thrown upon them."

He then states what the Roman law was upon the subject of contribution, and, still speaking of that law, he makes the following statement, which is the only quotation made by counsel on their brief:

"It was not necessary to wait till some one was damnified by having paid or having claim made against him for the whole; a bill might be filed to settle the amount due from each individual of a body liable to a common burden, and to compel the payment by each, of his share." (*Original brief*, p. 18.)

We have said that there are no co-obligors in this case, and that is conceded by counsel on the other side. The bill is not framed upon the theory that West Virginia was ever bound to the holders of the old bonds, or that she is now bound to the holders of the certificates issued by the State of Virginia, either as a co-obligor or otherwise. The claim is made against her by Virginia alone, and it

has been argued throughout the case that the indebtedness is to her. If the old bonds had been secured by a lien upon the public property situated in the new State, or by a pledge of the revenues to be derived from the people or territory embraced in the new State, it might have been contended that there was a direct liability to the creditors upon the part of West Virginia; but such was not the case. The bonds of a State, as this court has often said, are secured only by a pledge of its honor and good faith; and Virginia is still the same State that issued and sold the bonds. It cannot be necessary to make an argument to show that neither this court nor any other has power to exonerate her from any part of her liability. Even if such a power existed in any court, the creditors whose claims would be extinguished by the exoneration would be indispensable parties.

It is now contended by counsel for the plaintiff that there never was a compact between the two States with reference to the old public debt, and that no consent to the formation of the new State was ever given by the legislature of Virginia; and it is said that the question as to the existence of the compact cannot be relied upon by the defendant State in this argument because it is not specifically stated as one of the grounds of demurrer. The compact is set forth in the bill (pp. 4-6), and one of the separate grounds of demurrer is that the court has no jurisdiction to hear and determine the cause, which necessarily requires it to ascertain the foundation and character of the claim asserted and the nature and extent of the remedy sought by the plaintiff. The office of a demurrer is to present to the court the legal and equitable questions arising upon the face of the pleading—not to argue them—and one of the questions presented by the demurrer in this case is whether, if the compact is valid, the court has power to enforce it according to its terms.

We do not propose to reargue the question as to the existence of the compact or to discuss the validity of the Virginia act of May 13, 1862, consenting to the formation of the new State and asking its admission into the union under the constitution which had then been framed. The compact itself was entered into by the sovereignty conventions of the two States and consented to by Congress in accordance with the provisions of Clause 3 of Section 10 of Art. 1 of the constitution of the United States, and all that was required of the legislature of Virginia by Clause 1 of Section 3 of Art. 10 of the constitution was that it should give its consent, not to the compact, but to the formation of the new State out of a part of the territory of the old State.

Counsel claim in the reply briefs that the ordinance of the Wheeling Convention requiring West Virginia to assume a just proportion of the debt and prescribing the method of ascertaining it is binding upon that State, but deny that the conditions upon which the proposition was accepted are binding upon Virginia (Mr. Conrad's brief, pp. 22-23). We insist that the compact is binding as a whole or it is not binding at all, and that the act of the Virginia legislature, passed May 13, 1862, while it was not necessary to the validity of the compact, constituted a ratification of it by that body. Without this act the State of West Virginia could not have been constitutionally formed or admitted into the union, whether there was a compact or not.

Congress never passed but one act providing for the admission of the State into the union, and when it was afterwards actually admitted by the proclamation of the President, the constitution which Congress had already approved had not been altered in the slightest respect so far as it related to the compact between the two States. The only change that had been made, or that was required to be made, by Congress, was in relation to the institution of slavery.

But it is now argued that the compact between the two States has been abrogated by the omission of the State of West Virginia to include in the constitution of 1872 the same provision in regard to the old public debt that was contained in the constitution of 1862 under which the State was admitted into the union; but, notwithstanding this contention, it is still insisted by counsel that West Virginia became liable and is now liable for a just proportion of the debt as provided in the Wheeling ordinance, and which it is claimed constituted a part of the compact. The entire compact was that the new State should take upon itself a just proportion of the public debt, to be ascertained by charging to it all the State expenditures within its limits, and a just proportion of the ordinary expenses of the State Government since any part of the debt was contracted, and deducting therefrom the moneys paid into the treasury of Virginia from the counties included within the new State during that period, and that the legislature of West Virginia should ascertain the same as soon as practicable and provide for its liquidation by a sinking fund sufficient to pay the accruing interest and to redeem the principal within thirty-four years.

This compact was entered into by the sovereignty conventions of the two States. In one the proposition was made in the form of an ordinance, and in the other it was accepted in the form of a con-

stitutional provision; and then it was consented to by Congress, and thus became an absolute and permanent obligation of the two States, which neither of them could thereafter abrogate or alter. It was not necessary for West Virginia to repeat in a subsequent constitution the terms upon which she had accepted Virginia's proposition, and upon which the compact had been concluded with the consent of Congress. The compact itself provides that the new State shall assume a just and equitable proportion of the debt, and that the Legislature of that State shall ascertain what that proportion is, and establish a sinking fund sufficient to pay the interest and redeem the principal in thirty-four years. The latter part of the compact is as binding upon the two States now as it ever was. The legislature of West Virginia has not been abolished; it still exists and possesses full power to provide for the ascertainment and payment of the State's just proportion of the debt in accordance with the stipulations of the compact between the parties. The State of Virginia has not heretofore supposed that West Virginia had extinguished her obligation to assume and pay a just proportion of the debt, or that she could do so; but if the argument now made is sound, she has done so by merely omitting a part of the compact from her constitution.

The act of Congress admitting the State into the union and thereby, as this court has held, giving the consent of that body to the compact, is a law of the United States enacted in pursuance of the constitution, and is therefore the supreme law of the land; and the compact itself constitutes a part of that law. *Penna. vs. Wheeling Bridge Co.*, 13 How. 185. No State can abolish it or change it, even by an affirmative act, much less by a mere omission to repeat it in her constitution or statutes.

It is true, as stated in one of the reply briefs, that nearly forty-four years have passed since the compact was made, but it is also true that Virginia has repudiated it ever since 1871; and, although she has in her own exclusive possession all the accounts and vouchers necessary to effect a settlement, she has never presented to West Virginia any account, or even part of an account, which would enable the Legislature of that State to take any action in accordance with the Wheeling ordinance. It will be time enough for Virginia to make complaint against West Virginia when she has furnished that State with such an account or statement as will enable her Legislature, or a commission appointed by it, to ascertain the amount

claimed, in the manner prescribed by the Wheeling ordinance, which was Virginia's own chosen method of adjustment.

The reference to the fact that this court entertains jurisdiction of appeals from the Court of Claims involving demands for money, and renders judgment in such cases, is of no consequence in this discussion, because Congress has by statute not only consented that the United States might be sued on such claims, but has expressly authorized judgments to be rendered and directed their payment by the Secretary of the Treasury out of the general appropriations.

Act of March 3, 1863, Ch. 92, sec. 7; 12th, Stat. 766; Act of September 30, 1890, Ch. 1126, sec. 1.

The case of *Carter vs. State*, 12 La. Ann., 930, quoted from in the original brief of counsel for plaintiff, is not at all in conflict with our contention in the case at bar. That was a proceeding to subject money belonging to the State to the satisfaction of a judgment previously obtained, and the court decided that it had no power to do so, although the legislature had authorized the institution of the action in which the judgment was rendered. In the course of its opinion, the court said:

“The incidents and appurtenances of ordinary jurisdiction have no application to a case like this. Undoubtedly jurisdiction granted to render judgments between parties subject to judicial power and control implies power to execute such judgment. But the sovereign is not subject to judicial power and control except just so far as is consented thereto; the moment the limit of that consent is reached, the judiciary must instantly halt.”

But it is said by counsel that this court can afford adequate relief because it can ascertain and declare West Virginia's proportion of the debt, and that this will operate to exonerate Virginia from any further liability on account of the indebtedness. The adjudication would have no such effect; on the contrary, if Virginia is now liable, as her counsel contend, the effect of such adjudication would be simply to fix the amount of her liability, but with no judgment or decree for its payment. How that could afford any relief to Virginia in any respect, or to her creditors, we are unable to see.

While we do not consider it necessary to add anything to the argument heretofore made on that part of the demurrer which raises the question of multifariousness, it is proper to say that we do not controvert any of the propositions stated in Hogg's Eq. Proc., which is relied upon by counsel for plaintiff. They are in accord with the authorities cited by us.

Counsel quote from Mitford's Pl., p. 399, to show that there can be no misjoinder unless the parties have, or may have, conflicting interests in the suit, or unless some of them have no interest in the suit. What the author says, is:

"If the plaintiffs actually have, or may have, conflicting interests in regard to the object of the suit, or if any or either of them have no interest in the subject-matter of the suit, there is a misjoinder. But to be free from the objection of misjoinder it is not necessary that a co-plaintiff should have an identity of interest."

They also refer to Daniels' Chancery, pp. 301-2, to show that an auctioneer may be joined with the vendor in a suit against a purchaser, but they omit to state, or quote, the reason given by the author, which is —

"because the auctioneer has an interest in the contract, and may bring an action upon it; he is also interested in being protected against the legal liability he has incurred in an action by the purchaser to recover the deposit" (pp. 301-2).

He then says:

"Upon a similar principle in cases where all the plaintiffs have an interest in the subject of the suit but their interests are distinct and several, they will not be allowed to sue together as co-plaintiffs" (p. 302).

It is not usual to embody the speech of an advocate in a bill in chancery, and thus require the defendant to admit on demurrer the truth of the statements contained in it; yet that course has been pursued in the present case, and the counsel on the other side quote from the speech of Mr. Harrison to show that the ultimatum contained in the joint resolution of March 6, 1894, had been abandoned by Virginia in 1900. All that we can say in response to this is that the gentleman who made the speech had no authority from the State of Virginia to propose or agree to any settlement except upon the basis that the share of the State was only two-thirds of the debt. An examination of the act of March 6, 1900, will show that its preamble reaffirms the position which the State of Virginia had previously taken with respect to the extent of West Virginia's obligation for one-third of the debt, and that it does not repeal or modify any part of the joint resolution of March 4, 1894, but mere-

ly authorizes the commission to receive the certificates on deposit and to "take such action and institute such proceedings on behalf of the State as may in the judgment of the Commission and the Attorney General be needful and proper to protect the interests of the State and bring about and carry into effect a settlement as aforesaid." Under this act the commission had no power to settle by negotiation except upon the basis that Virginia had paid her full share—two-thirds—but it was authorized to sue for a settlement for the benefit of the certificate holders, and, of course, if less than one-third should be recovered from West Virginia in the suit, they had the power to receive it for distribution among the beneficiaries under the contract made with them.

J. G. CARLISLE,
For West Virginia.

Counsel:

CLARKE W. MAY.

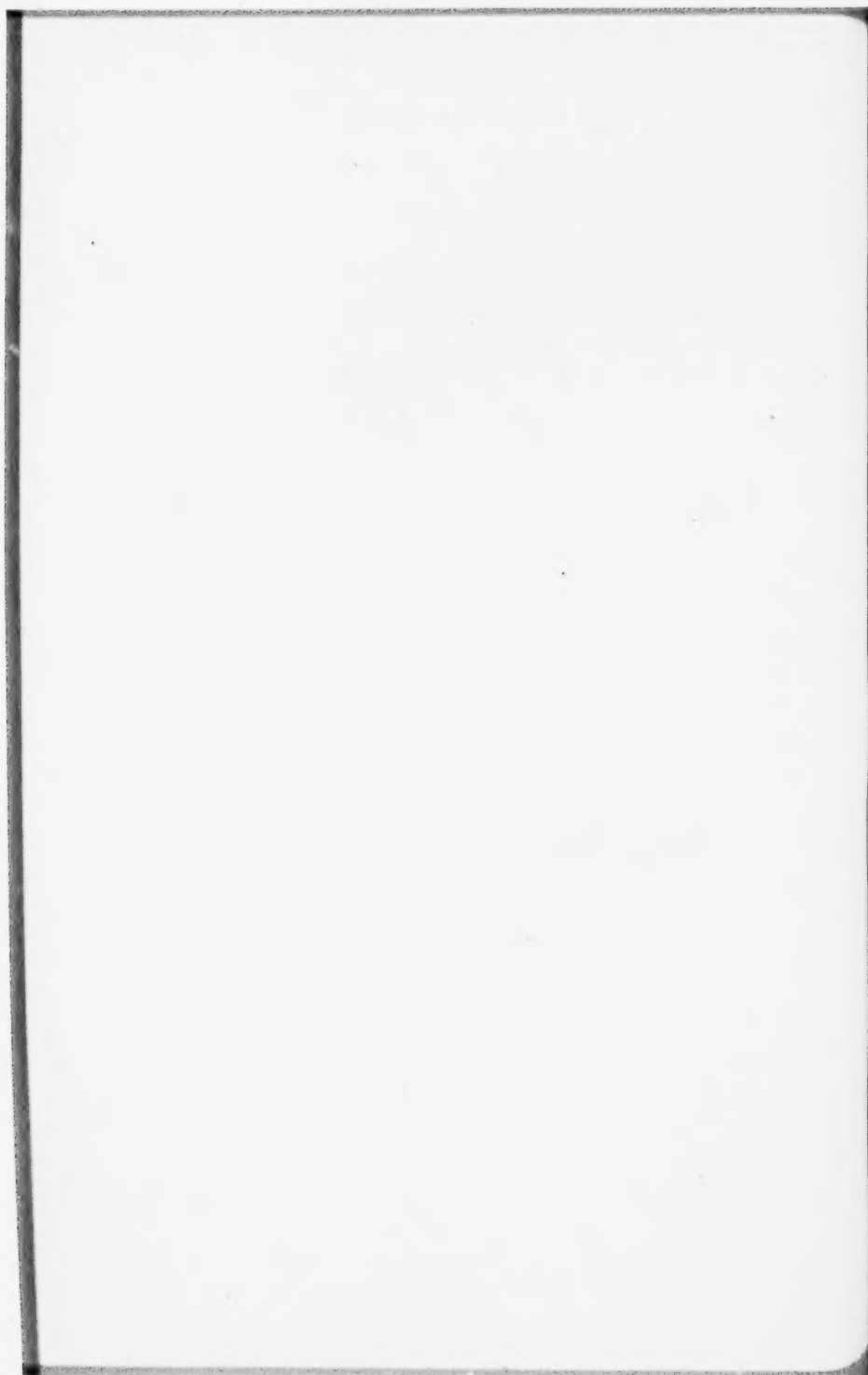
MOLLOHAN, McCLINTIC & MATHEWS.

CHAS. E. HOGG.

Supreme Court of the United States.

OCTOBER TERM, 1906.

Reply Brief of Counsel for Virginia.



[MEMORANDUM.—Because the time allowed them was scant, the counsel for the Commonwealth agreed to apportion certain portions of this reply brief between themselves. Hence it appears as one brief, though in two parts.]

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

Original No. 7.

COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

REPLY BRIEF OF COUNSEL FOR VIRGINIA UPON THE
DEMURRERS TO THE BILL.

I.

The bill is not demurrable on the ground of multifariousness, either because of uniting any two or more distinct and separate matters or grounds for equitable jurisdiction, or upon the alleged ground that it blends in the same bill two causes of action, one of which is of equitable and the other of legal cognizance.

(1) None of the grounds for equitable relief shown by the bill are distinct and separate and independent of the other grounds assigned in the bill for the relief prayed. All of the demands for relief shown by the bill are intimately connected with each other and are properly to be considered in stating any account and making any settlement between the two States.

It cannot be fairly contended that any item of charge against West Virginia suggested by the bill is not a proper item to be brought into any statement which shall fairly ascertain the true state of accounts between the parties and the amount which the plaintiff is equitably entitled to recover from the defendant.

It is manifest that the equity for contribution and the equity for exoneration, to which the bill plainly shows that the plaintiff is entitled, are, for the purposes and with reference to all the legitimate objects of this suit, so associated together and so connected with each other that it would be impossible for the court to give complete relief, and to ascertain the amount for which the plaintiff has a just claim against West Virginia without bringing all of these matters into the account.

It would be impossible fairly and justly to state the account between these parties without bringing into it the sums with which West Virginia is justly chargeable on account of the moneys and property constituting integral parts of the assets of the undivided State which West Virginia has received under the acts of the restored government of Virginia passed in 1863.

(2) But if, applying rigidly an extreme technical rule of pleading, it could be claimed that the demand which Virginia has a right, as shown by paragraph viii of her bill, to make of the defendant imports of legal cause of action, and could not for any reason be properly cognizable by a court of chancery in making a final settlement between the parties to this cause, then, according to the rule of common sense and common justice, well settled by the authorities, the averment of such a cause of action in the bill will not be fatal to the maintenance of the suit, but will be treated as surplusage by a court of equity, and either ignored in its consideration of the case or will be by amendment stricken from the bill without prejudice.

We are saved any necessity for any further discussion of this phase of the argument of defendant's counsel by the admirable statement of the law governing this subject, accurately expressed in the work upon "Equity Procedure" of which the learned counsel,

Mr. Charles E. Hogg, who opened the oral argument for West Virginia and is upon her brief, is the author.

The principles governing this subject, as stated in Hogg's Equity Procedure, edition of 1903, vol. 1, sec. 136, furnish a conclusive answer to the elaborate argument of the counsel for the defendant upon this branch of the case and are as follows:

"SEC. 136. Courts of equity have declined to announce a general rule applicable to all cases of multifariousness, *being guided by considerations of convenience in each particular case rather than by any absolute rule.* But there are certain cardinal principles which have been established by repeated and numberless decisions in the court of equity, and if borne in mind it will seldom if ever be found difficult to determine whether multifariousness exists in the particular case.

"As to what these particulars are, all the adjudged cases agree.

"From the numerous decisions relating to this matter, a few of which are cited in the foot-notes, the following principles may be safely declared to govern in questions of this character:

"1. A bill will always be deemed multifarious where several matters joined in the bill against one defendant are so entirely distinct and independent of each other that the defendant will be compelled to unite in his answer and defense different matters wholly unconnected with each other, and as a consequence the proofs applicable to each would be apt to be confounded with each other, and great delay might be occasioned respecting matters ripe for hearing by waiting for proofs as to some other matters not ready for hearing.

"2. It will be treated as multifarious where there is a demand of several matters of a wholly distinct and independent nature, in the same bill, rendering the proceedings oppressive because it would tend to load each defendant with an unnecessary burden of costs by swelling the pleadings with the statement of the several claims of the other defendant or defendants with which he has no connection.

"3. A bill against two or more defendants will be regarded as multifarious which also embodies a separate and distinct claim against one of the defendants only.

"4. A bill will not usually be regarded as multifarious when the matters joined in the bill, though distinct, are not absolutely independent of each other, and it will be more convenient to dispose of them in one suit.

"5. A blending of two causes of action in the same bill, one of which is of equitable cognizance and the other legal, will not render a bill multifarious, *as the latter will be treated*

as mere surplusage and stricken from the bill and the cause retained as to the equitable ground of the suit." (Italics, here and elsewhere, ours.)

These propositions are amply supported by the authorities cited by the learned author and by the following:

Story's Eq. Pl., secs. 271-278, 280, 284, 531, 532.

Mitf., Eq. Pl., by Jeremy, 181, 182, notes *a* and *b*.

Atty. Gen. vs. Merchant Tailors Company (1883), 1 Milne and Keene's Chy. R., 189, 191, 194.

Campbell vs. Mackey, 1 Mylne & Craig Chy. R., 622.

II.

The next ground of objection to the bill urged by defendant's counsel, which I will notice, is that the plaintiff has, as they allege, no interest in the subject matter of the controversy and asks no substantive relief for herself.

This position of opposing counsel is based upon an extraordinary misapprehension of the bill.

(a) The bill shows that the plaintiff has a very large direct claim against the defendant because of the fact that the plaintiff has paid off and satisfied in full obligations and evidences of indebtedness of the undivided State, including interest from the dates of payment of the several items constituting said demand, considerably in excess of \$25,000,000, and that for this Virginia has a just claim against West Virginia for contribution to the extent of West Virginia's equitable liability therefor.

See paragraph XVI, page 9 of the bill.

(b) *The bill shows that it is not true in fact*, as counsel argued, that Virginia has been released in respect to the unfunded portion of the bonds of the original State deposited with her under the act of 1871 and amounting, as appears from the exhibits printed at pages 73 and 90 of the bill, to \$12,703,451.79, with interest on the principal sum thereof from July 1, 1871. As to this portion of the old debt of the State, Virginia has never been released, and her own highest court, in *Greenhow vs. Vashon*, 81 Va., 342-343, has so declared. In that case Judge Richardson, delivering the opinion of the court, quoting with approval the dictum of Judge Staples in *Antoni vs. Wright*, 22 Gratt., 864-5, says:

"It is said that the creditor has released one-third of his

debt. I do not so understand it, and I will hazard the assertion the creditor does not so construe the law. If this was the intention of the framers of the act they have adopted an obscure and equivocal mode of expressing a plain and simple agreement. The creditor surrenders his bond and obtains a new one for two-thirds of his debt, and coupons for the interest. For the remaining one-third the bond is held in trust by the State, and a certificate is given him stating that payment will be provided for in accordance with such settlement as may be made with West Virginia. If that State is faithful to the obligations resting upon her the creditor will receive the other two-thirds also. On the other hand, if she repudiates these obligations there is no agreement or understanding absolving the State from the payment of the whole debt as before the passage of the funding bill."

And the Supreme Court of Appeals of Virginia, in *Higginbotham vs. The Commonwealth*, 25 Gratt., 627, expressed substantially the same opinion. This ought to be conclusive of this particular question for the purposes of this demurrer.

But, independently of said decisions, we assert with absolute confidence in the unquestionable correctness of the proposition, that it is impossible to read the act of March 30, 1871, and particularly section 3 of said act, found at pages 14 and 15 of the bill, without seeing not only that Virginia is not released, but that she has solemnly contracted that payment of said unfunded one-third, with the interest due thereon, "will be provided for in accordance with such settlement as shall hereafter be had between the States of Virginia and West Virginia in regard to the public debt of the State of Virginia existing at the time of its dismemberment."

* * * * *

The manifest effect of the transaction was to continue in full force the liability upon the unfunded third of each of the bonds so deposited, both as against Virginia and against West Virginia, the only concession that the creditor made being that payment could not be expected or required of Virginia until a settlement should be had between the two States.

While the creditor, as the result of this arrangement, took the risk of such a settlement ever being made, it was none the less the duty of Virginia to do all that could be reasonably and fairly expected of her to bring about and effect such a settlement; and, her repeated efforts to that end having proved abortive by reason of the failure of West Virginia to meet her overtures, this suit has become necessary.

Her equity to maintain this suit in respect to the \$12,700,000 of unfunded bonds deposited with her under the act of 1871 is based upon her right to exoneration to the extent of West Virginia's liability upon the indebtedness represented by those bonds.

By reason of the contract which her creditors have made with her, she has a further interest in maintaining this suit, viz., to obtain COMPLETE exoneration in respect to those unfunded bonds as to which she has been in no sense *released*, but can only be released by an adjudication of this court against West Virginia ascertaining West Virginia's aliquot liability on account of the said indebtedness.

(c) Nor is it true in any sense that Virginia has in any degree impaired her right to maintain this suit because she has agreed to turn over to her creditors entitled thereto the ratable proportion of any amount which she may obtain from West Virginia assignable to the holders of the unsatisfied obligations of the undivided State.

It cannot in any court of conscience impair a plaintiff's right to equity because her bill shows that it is her purpose to do equity.

Any recovery from West Virginia will, by the terms of Virginia's contract with the representatives of the creditors of the undivided State be ratably apportioned among all of the holders of the antebellum obligations of the original State, including Virginia as now constituted. The creditors other than Virginia will receive their *pro rata* share of such recovery in entire exoneration of Virginia, and Virginia will receive or retain the *pro rata* share of such recovery assignable to the obligations and evidences of indebtedness of the original State which she has paid in full, by way of equitable contribution to her.

It will be apparent from an examination of the contract between Virginia and the committee representing the certificates which she has issued, and which in turn represent the unsatisfied obligations of the undivided State, that, while the arrangements which Virginia has made with the common creditors or their representatives for her protection, and for their protection, with a view to their payment, and to her payment, and to her exoneration, enure alike to her benefit and to the benefit of the common creditors, West Virginia is not in the slightest degree prejudiced, nor are her interests or rights to any extent impaired by reason of any of these arrangements.

There were different stipulations in the certificates issued under the act of 1879, 1882, and 1892, in reference to the settlement of the

public debt of Virginia, but they do not impair Virginia's right to maintain this suit.

III.

With strange persistency counsel for West Virginia insist that jurisdiction has not been conferred upon this court by the judiciary clauses of the Federal Constitution over controversies between two or more States involving directly or indirectly a demand for the payment of money.

Their contention is that—

Jurisdiction imports power not only to decide, but to grant adequate relief, and—

That this court is powerless to give adequate relief to the plaintiff upon the case stated by her, and—

That therefore this court can have no jurisdiction of this cause.

We have shown in our brief, already filed, for the plaintiff that this question has been repeatedly adjudicated in this court, against defendant's contention, in cases so analogous to the case at bar that it is impossible to distinguish them upon any ground of principle as to this particular question.

But we have a further sufficient reply to make to this contention.

The proposition of opposing counsel rests upon the assumption that this court cannot give adequate relief.

That is not true. The court can give all the relief that is in the nature of things appropriate to the case and all that is prayed for by the bill.

It can cause the account between the two States to be stated and an ascertainment and an adjudication of the equitable proportion of the public ante-bellum debt of Virginia to be borne by West Virginia to be had, and upon confirming the report made by its master in chancery can, and will, adjudge and decree the amount which West Virginia is equitably bound to pay on account of the common indebtedness of the original State.

This, as is shown by the bill and pointed out in our former brief, not only will give Virginia adequate, but will accord her complete, relief, because it will operate to exonerate her from any further liability on account of that indebtedness to the extent already plainly shown.

In further reply to this branch of argument of defendant's counsel, I beg leave to add to what has already been said upon that subject, that it has never been held by this court that no execution or

process could under any circumstances be issued upon any judgment against a State upon any pecuniary demand.

Whether strictly private property of West Virginia, property owned for profit and charged with no public trusts or uses, property owned for some commercial purpose, or owned just as an individual might own such property, would be liable to levy, attachment, or sale under an execution issued under a decree of this court, is a question which we hope will never arise and can never arise unless West Virginia shall fail or refuse to respect a decree of this court and to comply with its terms.

It will be time enough then for this court to decide what further action, if any, shall be taken in enforcement of its decree.

We frankly say that we at present know of no property of defendant which would be liable to levy or sale under any execution issued by this court, but it is not very difficult to conceive of a condition of things in which West Virginia might own property within the jurisdiction of this court which would be liable to be subjected for the satisfaction of a decree in this case. I fully concede that only such property as was not held by that State for governmental purposes and not charged with any public trust could be subjected for the satisfaction of a decree of this court; but there may be circumstances under which property charged with a special trust for the satisfaction of the very debt claimed here, or property not charged with any public trust, belonging to the State of West Virginia and held by her, just as a private individual might hold such property, might be liable to be attached for the satisfaction of a decree of this court in this cause.

Tried by the same principles which have controlled this court and the State courts in respect to judgments entered against municipal corporations, there can be no question that the fact that an effective execution cannot be issued upon the judgment does not invalidate the judgment.

2 Dill., Munic. Corp., 4 ed., sec. 576.

2 Dill., Munic. Corp., sec. 856.

Tiedman, Munic. Corp., sec. 212.

The execution is in no sense and under no circumstances an essential part of the judgment.

Freeman on Judgments, sec. 2, and cases cited.

Whether a defendant has or has not any property on which a

lawful execution could be validly levied does not at all affect the validity, though it may affect the value, of a judgment against him.

III.

I come now to consider the ground upon which Mr. Carlisle, the distinguished counsel for West Virginia who closed the oral argument of the case, seems in his brief and in his oral argument to mainly rely in his advocacy of the demurrers, though it is a ground not mentioned or suggested in either of the demurrers.

His contention is that by reason of the provisions of the alleged act of the General Assembly of Virginia, passed May 13, 1862, which were as follows:

“That the consent of the legislature of Virginia be, and the same is hereby given to the formation and erection of the State of West Virginia, according to the boundaries and upon the provisions set forth in the constitution for the said State of West Virginia, and the schedule thereto annexed proposed by the convention which assembled at Wheeling, on the twenty-sixth day of November, eighteen hundred and sixty-one,”

and of the provisions of section 8 of article VIII of the constitution of West Virginia, which is in the following words:

“8. An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this State, and the legislature shall ascertain the same as soon as may be practicable and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years.”

a compact was created by which the legislature of West Virginia was constituted the sole tribunal to ascertain, adjudicate, and finally decide what was the equitable proportion of the public debt of the undivided State which West Virginia should assume and pay.

Upon this extraordinary contention counsel for the defendant seem now mainly to rest their case.

(a) We deny that the fact of such an alleged compact, not mentioned or suggested in the bill, can be relied on as ground of demurrer.

(b) We challenge the averment that any such act as the alleged

act of May 13, 1862, was ever passed by any legislature of the Commonwealth of Virginia, and we crave oyer of the act, if it is to be relied on.

(c) If the meaning and effect contended for by the counsel for the defendant could be fairly given to the terms of section 1 of the said alleged act of May 13, 1862, then Virginia has a right to insist, and does insist, that said act shall be at least reasonably, if not strictly, construed.

Under no fair construction of that act can it possibly have any such legal effect, even upon the violent hypothesis of counsel for the defendant, for the reason that the alleged consent and agreement of the Commonwealth of Virginia, as therein expressed, was predicated upon the admission of West Virginia into the Union under the provisions of the constitution for the State of West Virginia, and the schedule thereto annexed, proposed by the convention which assembled at Wheeling on the twenty-sixth day of November, eighteen hundred and sixty-one, while the fact is that West Virginia never was admitted into the Union under that constitution, but was admitted under an amended constitution submitted to the people of West Virginia by an ordinance adopted by a convention thereof on the sixteenth of February, eighteen hundred and sixty-three, and pursuant to a further ordinance adopted by the said convention, entitled "An ordinance to provide for the organization of the State of West Virginia," passed February nineteenth, eighteen hundred and sixty-three, as will appear from the said constitution and ordinances of the State of West Virginia, published in the volume entitled "Constitution and Statutes of Virginia and West Virginia," printed pursuant to the act of the legislature of West Virginia passed February, twenty-sixth, eighteen hundred and sixty-six.

Non constat but that the consent of the legislature of Virginia would never have been given in manner and form as expressed in the alleged act of February thirteenth, eighteen hundred and sixty-two, if predicated upon the amended constitution, which was subsequently submitted to the people of West Virginia and received their sanction at the polls. This is by no means so strained a construction as that which counsel for the defendant would feign give to this act.

(d) But we deny utterly that by any fair or reasonable construction of the language of the first section of said act of May thirteenth, eighteen hundred and sixty-two, taken in connection with the provisions of the constitution proposed for the State of West Virginia by

the convention which met in the city of Wheeling on the 26th of November, eighteen hundred and sixty-one, the language of that section was ever by any possibility intended by the legislature of Virginia or understood by the convention or by the people of West Virginia, or by any rational human being, to be, or to operate as, a SUBMISSION to the legislature of West Virginia of the question of the amount and proportion of the common debt of the original State which it was equitable and just for West Virginia to assume and pay; or that that enactment was ever intended by Virginia, or understood by West Virginia, or by any one, to bind Virginia to accept and abide by such determination of that matter as might be made by the legislature of West Virginia, however capricious or unjust its judgment might be; or was ever intended or understood by either of the parties, or by anybody, to constitute the legislature of one of the parties to the present controversy a tribunal with plenary power and exclusive jurisdiction to determine and decide anything in respect to the common *ante-bellum* debt of Virginia which would be binding upon Virginia; and yet such is the contention of the learned counsel, unless we misapprehend the language of their briefs.

All that could be reasonably inferred from the language used in said act of May thirteenth, eighteen hundred and sixty-two, taken in connection with the proposed constitution of West Virginia, was that Virginia gave her consent to the creation of the State of West Virginia out of her territory under that constitution and that section 8 of article VIII of the proposed constitution was designed not to create any new contractual relation or obligation between Virginia and West Virginia, but to be, and operate as, a mandate from the people of West Virginia to the legislature of West Virginia, requiring that legislature to assume an equitable proportion of the public debt of the original State, and as soon as practicable to ascertain the same and to provide for its liquidation by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years, and that Virginia was willing that West Virginia should become a State of the Union under a constitution which contained those provisions and the other provisions expressed in the constitution as formulated and proposed prior to May thirteenth, eighteen hundred and sixty-two.

Reasonably construed, the purpose and effect of section 8 of article VIII was to place upon the new State an equitable proportion of the public debt of the old State and to require, and make it the

duty of, the legislature of the new State to provide for the payment of West Virginia's equitable proportion of that debt, so that the entire amount, interest and principal, should be extinguished and paid off within the period of thirty-four years.

Nearly forty-four years have elapsed, and yet West Virginia has done nothing; has paid not one cent of the interest or the principal of the debt; but, on the contrary, has repudiated every obligation imposed upon her by the stipulations of the Wheeling ordinance which constituted the essential condition of her political existence.

(e) But the entire conception and theory of opposing counsel upon this subject have been demolished by the fact that West Virginia has repealed and abrogated the constitution under which she was admitted into the Union, by the adoption of a new constitution in eighteen hundred and seventy-two, which new constitution contains no provision whatever requiring that State to assume an equitable proportion, or any other proportion, of the *ante-bellum* debt of Virginia, or requiring the legislature of that State to provide for the payment of any portion of that debt.

See West Virginia Constitution, adopted in 1872; Code of West Virginia, 1887.

By her present constitution West Virginia ignores her obligation to pay any part of the debt, and if it had ever been true that anybody had ever attempted to constitute, or dreamed of constituting, the legislature of that State the supreme and ultimate arbiter between the two States as to the amount of the common debt which West Virginia should bear, West Virginia has not only failed and refused to discharge the duty as arbitrator, but she has actually abdicated any such function, duty, or power by repealing the constitution which counsel claim conferred such exclusive, supreme, and irreviewable jurisdiction upon her legislature.

IV.

The other points discussed in the briefs of defendant's counsel have been already anticipated and sufficiently met by the brief of counsel for Virginia already filed. A singular misapprehension of the language of the bill, and of the exhibits which constitute important parts thereof, has led counsel for the defendant into several errors of fact, two of which I deem it proper to notice. One is their contention that Virginia has ever made it a condition of any settle-

ment or negotiation with West Virginia that that State should assume one-third of the *ante-bellum* debt of Virginia.

It was a condition of the negotiation and settlement authorized to be made by the resolution adopted by the General Assembly of Virginia on the 6th of March, eighteen hundred and ninety-four (pp. 39-40 of the bill), that Virginia was not to be charged with or assume more than two-thirds of the debt of the original State already assumed and provided for by her as her equitable proportion thereof.

But even under that resolution there was no condition whatever as to what West Virginia was to pay. That was left wide open as a matter for negotiation and adjustment.

And by the act of March sixth, nineteen hundred, pages 41 and 42 of bill, beyond the shadow of a doubt, plenary power was conferred upon that commission, with the approval of the Attorney General, to make any settlement and adjustment with the State of West Virginia which it might be practicable to make, and which the commission and the Attorney General might approve, provided the creditors, as defined in the act, agreed to accept such amount as might be recovered from West Virginia as a full settlement of all their claims against the State of Virginia.

Another inaccuracy of statement by opposing counsel, founded upon a like misapprehension, is that Virginia has submitted *any ultimatum* to West Virginia, or has made as a condition of an amicable adjustment with West Virginia, or of a negotiation or accounting with West Virginia looking to such amicable adjustment, any condition that West Virginia should assume and undertake to pay any particular portion of the common debt or any sum whatever and particularly are the counsel for the defendant in error upon this point as to the last effort made by Virginia to bring about an amicable settlement, as will be seen from an examination of the address of Mr. Randolph Harrison, made on behalf of the Virginia Debt Commission before the joint committees on finance of the West Virginia legislature on the first of February, nineteen hundred and five, and printed on pages 66-80 of the bill.

Among other things of interest to this cause and to the questions now submitted to the court which will be found in that admirable address, Mr. Harrison, on page 76 of the bill, said:

"We do not ask that West Virginia shall commit herself as liable in any specific amount. We make no claim against her for any definite sum. We do not know what a statement of

the account will show; if it shows that West Virginia is not liable for any amount, that will end the matter. We only ask that your State will, through the proper authorities, unite with Virginia in stating the account between the two States in order that the question of her liability, if any, may be authoritatively ascertained. The work of your commission will, of course, be subject to such action as West Virginia might deem proper in the premises."

I beg leave to commend the statement of Virginia's case, as made in that address, to the attention and consideration of the court. Its perusal will most conclusively demonstrate to this court the rightfulness and righteousness of the cause of action stated in the bill.

Respectfully submitted.

WILLIAM A. ANDERSON,
Attorney General of Virginia.

MARCH 14, 1907.

THE COMMONWEALTH OF VIRGINIA
vs.
THE STATE OF WEST VIRGINIA.

REPLY BRIEF TO THE BRIEFS OF DEFENDANTS ON THE
DEMURRER.

In the brief of Mr. Carlisle there appears, for the first time, the suggestion that this court cannot take jurisdiction of this case, because of a COMPACT alleged to have been entered into between the two States of Virginia and West Virginia, by which the question of the liability of West Virginia to Virginia on account of the public debt of the parent Commonwealth of Virginia was submitted to the arbitrament and award of the legislature of West Virginia.

The facts which it is claimed constitute such compact are as follows, viz.:

(1) That the constitution under which the State of West Virginia was admitted into the Union on June 20, 1863, contained the following provision:

"An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this State, and *the legislature shall ascertain the same as soon as may be practicable* and provide for

the liquidation thereof by a sinking fund to pay the accruing interest and redeem the principal within thirty-four years."

(2) That on May 13, 1862, the legislature of (restored) Virginia passed an act entitled "An act giving the consent of the legislature of Virginia to the formation and erection of a new State within the jurisdiction of this State;" that by said act the consent of the legislature was given to the erection of the proposed new State "according to the boundaries and under the provisions set forth in the constitution for the said State of West Virginia, and the schedule thereto annexed, proposed by the convention which assembled at Wheeling on the twenty-sixth day of November, 1861."

(3) That the State of West Virginia was admitted into the Union on the 20th day of June, 1863, under the constitution framed by its convention, approved by the State of Virginia and the Congress of the United States. "And thus the consent of that body was given to all the provisions of the agreement and it became a legal and constitutional compact between the two States."

(Mr. Carlisle's Brief, page 36.)

To this suggestion of a "compact" between the two States we have to say in reply:

1. That this is not among the grounds assigned in the formal demurrer heretofore filed in this cause, but is set up for the first time in the brief of Mr. Carlisle, and is again relied on in the brief of the Attorney General of West Virginia, subsequently filed.

2. That it is not a ground proper to be considered on demurrer, because it involves alleged facts which do not form any part of the case stated in the bill, viz., the fact that on May 13, 1862, the legislature of Virginia, by an act regularly passed, by a legislature duly assembled, consented to the erection of the new State of West Virginia "within the jurisdiction of this State." Not only is this alleged act not stated or admitted in the allegations of the bill, but it nowhere appears in the record of the case, nor is it set forth even in the briefs of counsel.

3. That the Commonwealth does not admit, but is prepared to deny, when opportunity is afforded it, that any such valid, constitutional act was ever passed by the legislature of Virginia, but that a demurrer affords no such opportunity to complainant to traverse the allegation of the existence of such act or of showing its non-existence.

4. That the existence and consequent effect of such an act should be asserted by a plea, to which replication might be made, or by answer, to which denial might be opposed, and thus an issue presented to which proper proof might be directed.

5. That from the official publications of the acts of assembly of the (restored) State of Virginia it distinctly appears that the regular session of that body adjourned *sine die* on February 13, 1863; that the constitution of the (restored) State of Virginia provides that extra sessions of the legislature may be convened only upon a proclamation of the governor of the Commonwealth calling the same; that while it does appear that the members of the General Assembly did assemble and were in session on the 13th of May, 1863, it does not appear from the proceedings of that body in the officially published journals of its proceedings that it had been called to meet by the proclamation of the governor.

6. That the constitution adopted by the convention of West Virginia, which assembled at Wheeling on the 26th of November, 1861, was not the constitution which was approved by Congress and under which the State of West Virginia was admitted into the Union, but, that that Congress did refuse to admit the State into the Union under that constitution until the same was amended in certain indicated particulars, and the said constitution was accordingly so amended.

7. That even assuming all the facts relied on as constituting such a compact to be established, yet the conclusion deduced therefrom is fallacious and unsound, in this, viz., that the provision of the constitution of West Virginia that "an equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, *shall be assumed* by this State, and the legislature shall ascertain the same as soon as practicable, and provide for the liquidation thereof," &c., does not import or mean that there was conferred upon the legislature power to adjudicate the fact or the amount of such "equitable proportion," or that there was lodged in the legislature any discretion whatever in the matter of such ascertainment.

In construing this provision of a constitution we must have regard to the subject-matter and the policy and*purpose of the framers as disclosed by the instrument in all its parts. Here was a new State, about to be formed within the jurisdiction of an old State. That old State had, on August 20, 1861, just three months before,

by an ordinance, provided "for the formation of a new State out of the portion of the territory of this State," and it had by the same ordinance declared that "the new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, to be ascertained by charging to it all the State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government since any part of this debt was contracted, and deducting therefrom the moneys paid into the treasury of the Commonwealth from the counties included within the new State during said period."

It is impossible to suppose that the new State should not have had this in mind when it framed its own constitution, and that when it provided that its legislature "shall ascertain the same as soon as practicable" it referred to the method of ascertainment prescribed by the Virginia convention in the very ordinance which provided for the creation of the new State. It seems to be at least reasonable to recognize that the ordinance of the Virginia convention and the provision of the West Virginia constitution should be taken as being *in pari materia* and construed together. It would then follow that what was meant by the expression the legislature "shall ascertain" was that the legislature should learn as soon as practicable the result of the method prescribed by the Wheeling ordinance, and then provide for the liquidation of the amount so ascertained.

It is simply preposterous to suppose that Virginia ever agreed to submit the matter of West Virginia's indebtedness to the arbitrament and award of West Virginia herself.

It should be enough to utterly repel this suggestion of a "compact" to inquire why, if such "compact" ever existed, in all the forty-three years that have elapsed since it was entered into, West Virginia has never, through her succession of governors, legislatures, and attorneys general, indicated and announced that it was upon such "compact" that she stood, and that to its terms and provisions she would hold Virginia, and why, through that long period, no step has ever been taken by West Virginia, through her legislature, to enter upon the performance of the duty which such "compact" imposed, or to notify Virginia that she stood ready and willing to enter upon such duty.

The suggestion that the case of Virginia *vs.* West Virginia, decided by this court thirty-six years ago, had restrained her from so

doing is scarcely creditable to the intelligence of the inventor of that excuse.

Again, it is suggested in the briefs of demurrants, and was urged in oral argument, that Virginia had been released from all liability on account of the public debt of the old Commonwealth, evidenced by her bonds outstanding on January 1, 1861.

The grounds relied on to support this suggestion were indicated as follows, viz:

(1) That by the terms and provisions of the act of the General Assembly of Virginia of March 30, 1871, entitled "An act to provide for the funding and payment of the public debt" (Record, p. 13), and the acceptance thereof by the holders of the bonds of the Commonwealth, such holders released Virginia from all liability to them on account of the original public debt existing on January 1, 1861, and for which West Virginia was bound with Virginia, and they created with Virginia a new debt, evidenced by the new bonds of Virginia, for two thirds of the amount of the old bonds, and accepted from Virginia a certificate showing that for the remaining one-third of such amount they would look for their payment only to such funds as might thereafter be obtained from West Virginia in satisfaction of her contributive share of the old public debt.

For reply to this ground we refer to the act itself. Its preamble fully recites its purpose. Its terms and provisions are contrived to strictly carry that purpose into effect. The third section of the act (Record, p. 14) shows that the bonds surrendered by the holders were not surrendered for cancellation and extinguishment of the obligations, save as to two-thirds of the amount of each bond so surrendered, and that as to the remaining one-third, which was estimated to be the amount of West Virginia's just and equitable proportion of the common debt, "the State of Virginia holds said bonds, so far as unfunded, in trust for the holder or his assignees." The bonds, as to such one-third, could not be "canceled" and at the same time "held in trust for the holder of his assignees." Virginia, by giving her new bond to take the place of the old bond, cannot be held to have paid her debt, but only to have substituted one security or evidence for another. A creditor, by surrendering an old bond and accepting a new one for the same debt from the debtor, has not received payment or satisfaction of the debt, unless such was the plain intention of the parties. The act itself as well as the certificate issued under it (Record, p. 72) show that such was not the intention.

(2). That by the act of the General Assembly of Virginia of March 28, 1879 (Record, p. 16), it was expressly provided, in the seventh section (Record, p. 19), "The acceptance of the said certificates for West Virginia's one-third, *issued under this act*, shall be taken and held as a full and absolute release of the State of Virginia from all liability *on account of the said certificates.*"

Observe, the release of Virginia is not from her liability on account of the old bonds surrendered by the holder. These old bonds still are to remain, so far as the unfunded one-third of their amount, held in trust for the holder, but the release here provided for is expressly "on account of these certificates," by which was plainly meant that Virginia would not recognize these certificates as creating any distinct and substantive evidence of indebtedness on her part. They should not be construed to be causes of action against her. The holder, by surrendering his bond to be held in trust for him by Virginia did thereby agree to await the result of Virginia's efforts to obtain from West Virginia the amount of her "just and equitable proportion of the public debt," which amount Virginia solemnly dedicated to the satisfaction *pro rata* of the one-third for which the bonds were held in trust by her. This provision in the seventh section of the act was designed to preclude the idea that these certificates created a new and distinct liability of Virginia. The previous language of the seventh section is—

"The owners of all classes of bonds mentioned in this act, and who shall not yet have received certificates representing the remaining one-third of their principal and interest, due and payable by the State of West Virginia, *shall receive certificates of a like character to those issued under the act of March 30, 1871, when they make such exchange,*" &c.

We have seen that the certificates issued under the act of March 30, 1871, declared on their face (Record, p. 72) that "the State of Virginia holds said bonds so far as unfunded in trust for the holder thereof or his assignees, and these certificates, issued under this act of 1879, were to be of "like character." It is manifest, then, that under the act of 1879 there was no release by the bondholders of the liability of Virginia on the bonds surrendered to Virginia and held by her in trust for the holder as to the one-third.

(3) That under the act of February 14, 1882, entitled "An act to ascertain and declare Virginia's equitable share of the debt created before and actually existing at the time of the partition of her territory and resources, and to provide for the issuance of bonds

covering the same, and the regular and prompt payment of interest thereon" (Record, p. 21 *et seq.*), Virginia obtained a release of liability from the bondholders.

This was the act passed by the repudiating legislature, under the malign influence of the Mahone-Riddleburger reactionaries. This act was the fruitful source of all the litigation that so long disturbed the patience of this court, from *Hartman vs. Greenhow*, 102 U. S., 877, down through many years. By section 6 of this act (Record, p. 28) the form of a certificate was prescribed, which recites that "Virginia has this day discharged her equitable share of the — bond, * * * leaving a balance of — dollars * * * to be accounted for by the State of West Virginia, without recourse upon this Commonwealth."

Now this certificate does not even purport to be a contract on the part of the bondholder, nor does the act itself purport to alter, amend, or repeal the former acts. It was a mischievous attempt, conceived in wicked folly and wrought out in ignorance, to repudiate the public debt. It could operate only prospectively, and but few of the bonds remained at the date of its enactment on which it could operate. Whatever its purpose and intent were, it could have no sort of effect on the relations then existing between Virginia and West Virginia nor between Virginia and those of her creditors who had already surrendered their bonds and received the certificates.

That by the act of February 20, 1892, entitled "An act to provide for the settlement of the public debt of Virginia not funded under the provisions of" [the preceding act], Record, p. 31,) Virginia was released. This was the first of a series of acts looking to the employment of a commission or committee as an instrumentality through which an arrangement might be made with all the holders of the bonds of every description issued by Virginia, whether funded or unfunded, under which all such bonds and the certificates issued in connection therewith might be assembled and united action taken by them with and through Virginia to obtain a final settlement of West Virginia's liability for her share of the public debt, the recovery of the amount of such liability, and the payment thereof to Virginia and the distribution by Virginia of such amount among the persons entitled thereto.

This was followed by the act of March 6, 1894 (Record, p. 39), and the act of March 6, 1900 (Record, p. 41).

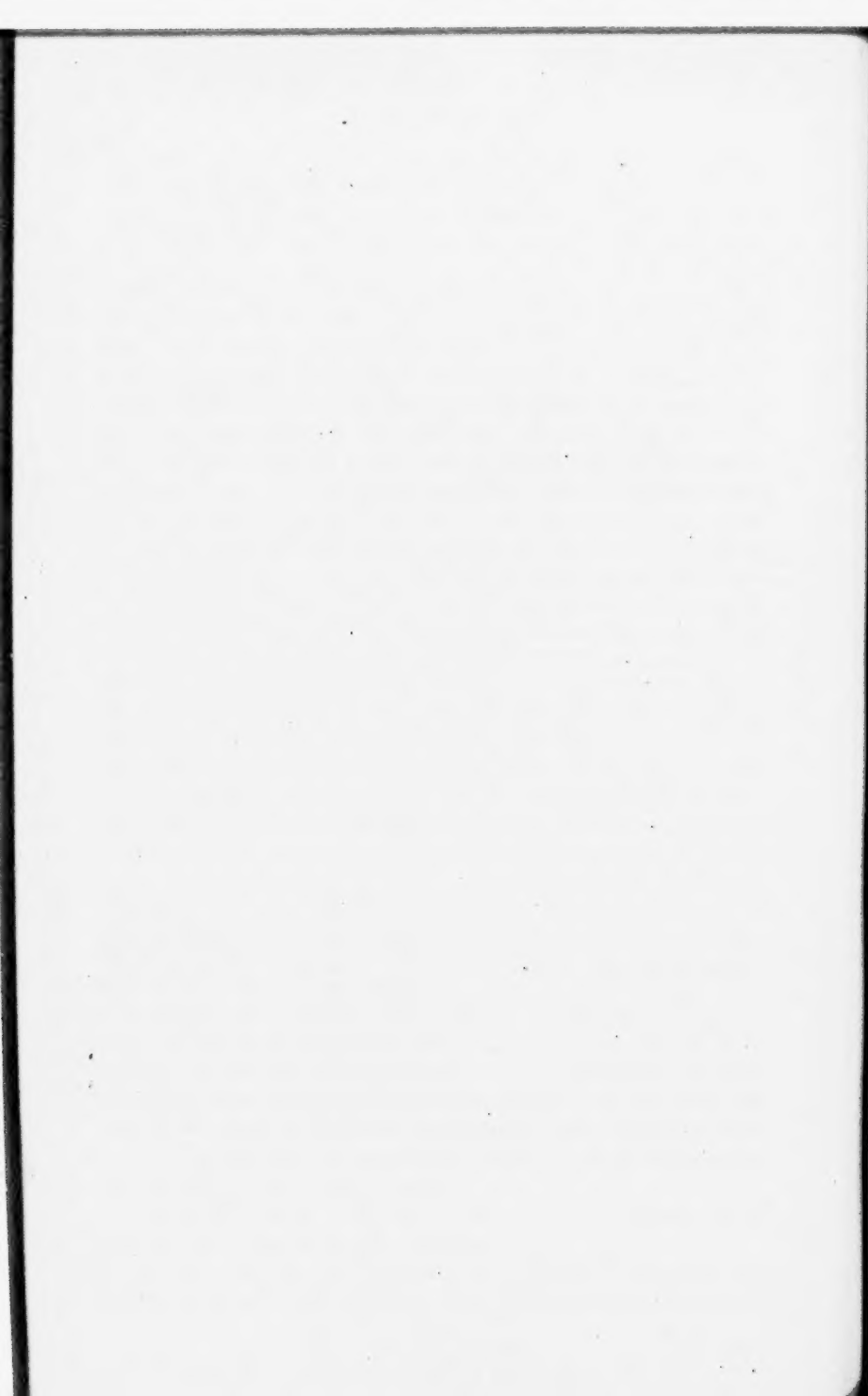
On page 43 of the record appears the "Report of the commission appointed and acting under the joint resolution of the General As-

sembly of Virginia approved March 6, 1894, and the act of the said General Assembly approved March 6, 1900, with respect to certain certificates issued by the State in connection with the debt of the original State of Virginia, and known as Virginia deferred certificates."

This report is contained between pages 42 and 82 of the record. It shows all that was done by the Virginia Debt Commission and the bondholders' committee in obtaining concurrent action on the part of the creditors; it shows the scrupulous and intelligent care taken by the General Assembly of Virginia in requiring that a large majority of such creditors should unite in their demands before the Commonwealth would take decided action; it required that an open, public, formal, and earnest request should be made upon West Virginia to come into a friendly settlement of these matters before any resort should be had to the courts for redress; it shows the extreme care taken by the Attorney General of Virginia to see that he was invested with full authority, and that all the conditions precedent to its exercise had been fully performed before he would institute the proceedings provided for in the acts; it shows, too, the address made by the Virginia Debt Commission to the legislature through their spokesman, Mr. Randolph Harrison (Record, p. 66), in which are the full history of the debt, the legislation had thereon, the repeated efforts made by Virginia to induce West Virginia to come into a friendly settlement, the sanction of law on which Virginia relied to support her demand, and the unpleasant consequences that must ensue in the event of West Virginia's persistent refusal to make a settlement.

The address was received with respectful silence, and it is of consequence to note that although it was heard by the assembled body of the legislative committees of West Virginia's intelligent legislature, that not then, or at any time since, as at no time in the long period that had passed, was any intimation given, or ground of refusal to the invitation urged, that West Virginia would not enter upon the proposed settlement because a compact had been entered into between the two States, and which still subsisted, by which that very legislature had been chosen as the final arbitrator of the very matter as to which Virginia was asking a settlement.

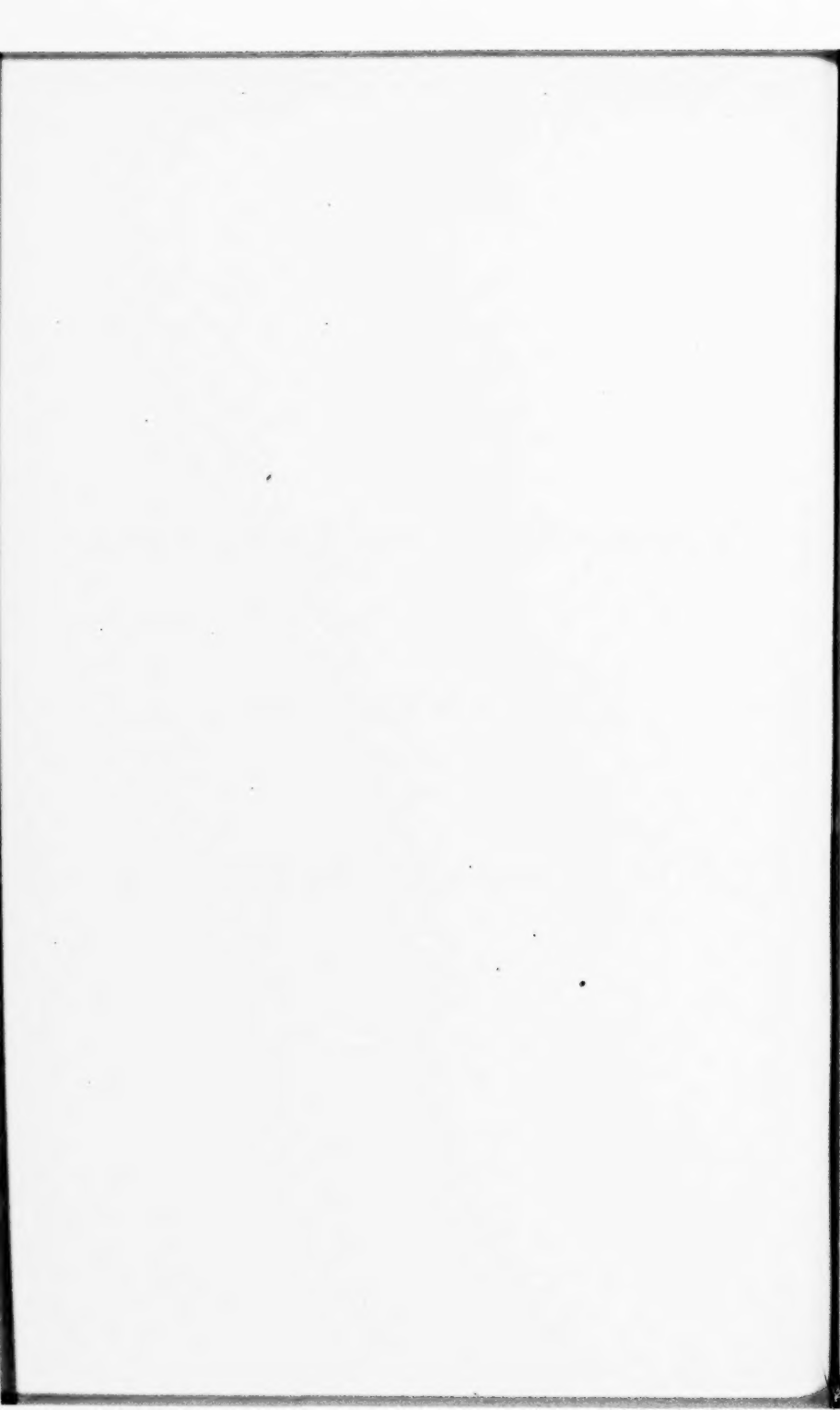
HOLMES CONRAD,
Of Counsel for Virginia.



Supreme Court of the United States.

OCTOBER TERM, 1906.

Decision Overruling the Demurrer.



IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

ORIGINAL No. 7.

COMMONWEALTH OF VIRGINIA
vs.) In Equity.
STATE OF WEST VIRGINIA.

[May 27, 1907.]

This is a bill filed, on leave, February 26, 1906, by the Commonwealth of Virginia against the State of West Virginia.

The bill averred that—

“On the first day of January, 1861, complainant was indebted in about the sum of \$33,000,000 upon obligations and contracts made in connection with the construction of works of internal improvement throughout her then territory. By far the greater part of this indebtedness was shown by her bonds and other evidences of debt, given for the large sums of money which she from time to time had borrowed and used for the above purpose; but a portion of her liabilities though arising under contracts made before that date, had not then been covered by bonds issued for their payment.

“In addition to the above liability to the general public, there was a large indebtedness evidenced by her bonds and other liabilities held by and due to the Commissioners of the Sinking Fund and the Literary Fund of the State, as created under her laws amounting, the former to \$1,462,993.00, and the latter to \$1,543,669.05 as of the same date.

“The official reports and records showing the exact character and amounts of the public debt thus contracted and how the same was created, are referred to, and will be produced upon a hearing of the case.

“(2) That portion of the territory embraced in what constitutes the present territorial limits of Virginia was prior to that date devoted mainly to agriculture, and to some extent to grazing and manufacturing, which afforded its chief sources of revenue, while that portion included in what now constitutes the State of West Virginia had vast potentialities of wealth and revenue in the undeveloped

stores of minerals and timber, which had been known for many years prior to the date named, and their prospective values, if made accessible to the markets of the country, were understood to be well nigh beyond computation. It was to hasten and facilitate the development of these sources of wealth and revenue by the construction of graded roads, bridges, canals and railways, extending through the State from tidewater towards the Ohio River, that the Commonwealth of Virginia, in the first quarter of the Nineteenth Century, entered upon a system of public internal improvements, which it was contemplated should include the entire territory of the State, and embraced in its design the construction of public works adapted, not to the needs of any one portion of the State alone, but of the entire State, as a unit of interest. The larger part of these works were constructed East of the Appalachian range, as leading up to the undeveloped territory West thereof, but a very considerable portion of them were, at an expense of several millions of dollars, constructed West of said range within the territory now included in the State of West Virginia; and the completion of some of the main lines of improvement beyond the said range and through to the Ohio River, since the first day of January, 1861, has increased to a very great and material extent the values of real estate, including coal and timber, in the said territory now included in West Virginia, thus carrying into effect the original scheme of improvement, which could not have been done had not the lines East of said range been first constructed; and your Oratrix believes and avers that the property values within the limits of West Virginia have been enormously enhanced in a large measure by reason of these improvements. The money appropriated to the payment of the annually accruing interest on the said debt, prior to January 1, 1861, and to the formation of the Sinking Fund for the ultimate redemption thereof, was derived from taxes imposed upon the property subject to taxation throughout the entire State. The first of this indebtedness to be contracted was a small amount borrowed by the State in the year 1820 and the debt was thereafter from time to time continued and increased by renewals and new loans until it reached the amount above stated in 1861.

“(3) The Commonwealth of Virginia was induced to enter upon the construction of this general system of internal improvements, in a very large measure for the purpose of developing the aforesaid resources of the western portion of the State, now constituting the State of West Virginia, thereby ameliorating the condition of her citizens residing therein; and it was with this view that she took upon herself the burden of the public debt for which her bonds were issued, without which debt such improvements could not have been undertaken. In corroboration of this view it will appear from an inspection of the legislative records of the State, where the vote carrying the appropriations for such public improvements was recorded, that in nearly every instance a majority of those members of the House and Senate of the original State, who then represented the counties now composing West Virginia, voted for such appropri-

ations. Indeed it appears from those records that a great majority of the Acts of the legislature of Virginia under which said indebtedness was created, would have failed of their passage, had the representatives from the counties embraced in what is now West Virginia opposed their enactment, and that a very large proportion of said indebtedness was actually contracted over the votes of a majority of the representatives from the counties and cities embraced in the limits of the present State of Virginia. This will be found to be true, not only in the legislature for one single session, but in the legislatures for many successive years, thus showing it to have been a fixed policy of the people in that portion of the State now constituting West Virginia to participate in, support and carry out this general plan of internal improvements in the State.

"4. The development of this system of public improvements thus entered upon was, from its character and extent, necessarily progressive, and the same extended with the general growth and increasing needs of the State, and was incomplete, as above stated, in 1861, though a very considerable portion of such improvements had, prior to that time, been constructed as above stated, in the territory now constituting West Virginia, in order to meet the needs of the people of that portion of the State for their local purposes. As early as the year 1816 a Board of Public Works was created by law for the State, the members of which were elected by the voters of the State at large, and this Board had in charge the construction and supervision of all the works of public improvement in this State. The annual reports of this Board will be referred to for information as to the character, extent, cost and location of the public works and internal improvements constructed in the State prior to January 1st, 1861. The amounts expended upon the construction of these works in what is now West Virginia can only be accurately ascertained by an examination of the numerous entries in the records of this Board extending through a number of years and showing such expenditures as made from time to time.

"5. On the 17th of April, 1861, the people of Virginia, in general convention assembled, adopted an ordinance by which it was intended to withdraw Virginia from the Union of the States. From this action a considerable portion of the people of Virginia dissented, and organized a separate government which was known and recognized by the government of the United States as the 'Restored State of Virginia,' and will be hereafter referred to in this bill as the 'Restored State.'

"6. On the 20th day of August, 1861, the Restored State of Virginia, in convention assembled, in the city of Wheeling, Virginia, adopted an ordinance to 'provide for the formation of a new State out of the portion of the territory of this State;' Section 9 of which ordinance was as follows, to-wit:

"9. The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, 1861, to be ascertained by charging to it all the state expenditures within the limits thereof, and a just proportion of the

ordinary expenses of the State government since any part of said debt was contracted, and deducting therefrom the moneys paid into the Treasury of the Commonwealth from the counties included within the said new State during said period. All private rights and interests in lands within the proposed State, derived from the laws of Virginia prior to such separation shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in the State of Virginia.'

"7. On the 31st day of December, 1862, an Act was passed by the 37th Congress of the United States providing that the new State thus formed in pursuance of the ordinances of the Wheeling convention above referred to, should, upon certain conditions, be admitted into the Union by the name of West Virginia, with a constitution which had theretofore been adopted for the new State by the people thereof, such conditions being that a change should be made in such proposed constitution in regard to the liberation of slaves therein; and it was provided by this Act of Congress that whenever the President of the United States should issue his proclamation stating the fact that such change had been made and ratified, thereupon the Act admitting the new State into the Union should take effect sixty days after the date of such proclamation. Such proclamation declaring these conditions to have been complied with was duly made by President Lincoln on April 20th, 1863, and West Virginia, in conformity therewith and by the operation of said Act of Congress, was admitted into the Union as a State on the 20th day of June, 1863; and thereupon the State of West Virginia became fully organized, and each of its departments of government commenced operation on the date last named.

"8. Pending the admission of the State of West Virginia to the Union the General Assembly of the Restored State of Virginia passed February 3, 1863, the following Act:

'That all property, real, personal and mixed, owned by, or appertaining to this state, and being within the boundaries of the proposed State of West Virginia, when the same becomes one of the United States, shall thereupon pass to, and become the property of the State of West Virginia, and without any other assignment, conveyance or transfer or delivery than is herein contained, and shall include among other things not herein specified all lands, buildings, roads, and other internal improvements or parts thereof, situated within said boundaries, and vested in this state, or in the president and directors of the literary fund, or the board of public works thereof, or in any person or persons for the use of this state, to the extent of the interest and estate of this state therein; and shall also include the interest of this state, or of the said president and directors, or of the said board of public works, in any parent bank or branch doing business within said boundaries and all stocks of any other company or corporation, the principal office or place of business whereof is located within said boundaries, standing in the name of this state, or of the said president or directors, or of the

said board of public works, or of any person or persons, for the use of this state.'

'That if the appropriations and transfers of property, stocks, and credits provided for by this act, take effect, the State of West Virginia shall duly account for the same in the settlement hereafter to be made with this state, provided that no such property, stocks and credits shall have been obtained since the reorganization of the state government.' "

Complainant charged "that the property which was by the operation of this Act appropriated and transferred from the State of Virginia to the State of West Virginia, and which was subsequently received and enjoyed by the State of West Virginia, consisted of a number of items, and the value of it amounted in the aggregate, to several millions of dollars, the exact amount your Oratrix is unable at this time more definitely to ascertain and state. That of the bank stocks alone, which were transferred under the operation of this Act, the State of West Virginia realized and received into her Treasury from the sale thereof about Six Hundred Thousand Dollars; and that no part of the property so received by West Virginia had been obtained by Virginia since April, 1861."

"9. And by a further act of the General Assembly of the Restored State of Virginia passed on the next day, February 4th, 1863, it was enacted:

'1. That the sum of One Hundred and Fifty Thousand Dollars be, and is hereby appropriated to the State of West Virginia out of moneys not otherwise appropriated, when the same shall have been formed, organized and admitted as one of the States of the United States.

'2. That there shall be, and hereby is appropriated to the said State of West Virginia when the same shall become one of the United States, all balances, not otherwise appropriated, that may remain in the treasury, and all moneys not otherwise appropriated, that may come into the treasury up to the time when the said State of West Virginia shall become one of the United States: provided, however, that when the said State of West Virginia shall become one of the United States, it shall be the duty of the auditor of this State, to make a statement of all the moneys that up to that time, have been paid into the treasury from counties located outside of the boundaries of the said State of West Virginia, and also of all moneys that up to the same time, have been expended in such counties, and the unexpended surplus of all such moneys shall remain in the treasury and continue to be the property of this State.'

"And this last named sum of One Hundred and Fifty Thousand Dollars, together with other sums belonging to the State of Virginia, were turned over to and received or collected by the new State of West Virginia after its formation as aforesaid.

"10. The Constitution of the State of West Virginia, which became operative and was in force when she was admitted into the Union, contained the following provisions:

"By Section 5 of Article VIII. of said Constitution it was provided:

'5. No debt shall be contracted by this State except to meet casual deficits in the revenue, to redeem a previous liability to the State, to suppress insurrection, repel invasion, or defend the State in time of War.'

"And by section 7 of Article VIII. it was provided:

'7. The legislature may, at any time, direct a sale of the stocks owned by the State, in banks and other corporations, but the proceeds of such sale shall be applied to the liquidation of the public debt, and hereafter the State shall not become a stockholder in any bank.'

"And by section 8 of Article VIII. it was provided:

'8. An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this State, and the legislature shall ascertain the same as soon as may be practicable and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years.'

"At the time the Constitution containing these provisions was adopted, West Virginia did not owe, and could not have owed, any 'public debt' or 'previous liability,' except for her just, contributive proportion of the public debt of the original State of Virginia, and for the money and property of the original State which had been transferred to and received by her under the Acts of the General Assembly of the Restored State of Virginia above set forth. By the provisions of Section 8 of Article VIII., above cited, she expressly assumed her equitable proportion of the debt of the original State as it existed prior to the first day of January, 1861. By Section 5 of the same Article VIII., above set forth, her Constitution forbade the creation of any debt 'except to meet casual deficits in the revenue, to redeem a previous liability of the State,' &c., and there was not and could not have been any such 'previous liability,' except her portion of the debt of the original State, and her liability for the money and property of the original State which had been transferred to and received by her under the Acts of the General Assembly of the Restored State. And Section 7 of the same Article of her Constitution, above cited, authorized the sale of the stocks owned by the State, in banks and other corporations, the proceeds to be applied to the liquidation of the public debt; and she had no such stocks, except those acquired, as above stated, from the original State. This section of her constitution also expressly required the proceeds of such sale to be applied to her public debt, which public debt could only have been her proportion of that of the original State of Virginia, and her liability for the money and property of the original State which had been transferred to her.

"11. After the year 1865 and prior to the year 1872 attempts were made at different times by the public authorities of both the Commonwealth of Virginia and the State of West Virginia, respectively,

to ascertain their contributive proportions of the common liability resting upon them for the public debt of Virginia, contracted prior to January 1st, 1861; but all such attempts proved ineffectual and vain, and no accounting or settlement of any kind was ever had between the two States in regard to this debt.

"12. The efforts looking to a settlement by the concurrent action of the two States having proved abortive and your Oratrix being anxious to adjust the portion of the common debt which it was right that she should assume and pay, upon terms just and equitable alike to the public creditors and to West Virginia, made several efforts to effect such a settlement.

"The first of these was made by the General Assembly which was chosen at the close of the period of 'destruction and reconstruction,' which, following closely upon the period of disastrous war, had inflicted upon her people injuries and losses, the harmful effects of which were then by no means realized.

"The purpose of the representatives of the Commonwealth, then just emerging from conditions which had impoverished her people and paralyzed their productive energies, to assume and pay to the utmost every dollar which her most exacting creditor could demand of her, was expressed in the Act of her General Assembly, approved March 30, 1871.

"By the terms of settlement embodied in this Act, your Oratrix undertook to give her obligations bearing 6% interest for two-thirds of the principal, and for two-thirds of the past due interest, and also for two-thirds of the interest on that accrued interest, which accrued interest to the extent of nearly \$8,000,000, had been funded after the War in new bonds of Virginia, thus capitalizing at 6% not only the interest, but interest upon that interest.

"It was soon apparent that Virginia had by this measure assumed a heavier burden than she was able to bear, and so other plans for the settlement of the State debt were attempted by the Acts of the General Assembly of the Commonwealth approved March 28, 1879, and February 14, 1882, until at length a final and satisfactory settlement of the portion of the debt of the original State which Virginia should assume and pay was definitely concluded by the Act of February 20, 1892. Your Oratrix will file copies of each of the Acts of her General Assembly herein mentioned as exhibits to this bill, and to be read as part hereof.

"13. As farther indicating the great burden which your Oratrix, notwithstanding the disaster and loss above referred to, has assumed and met on account of the common debt of the undivided State, she shows your Honors that, since January 1st, 1861, she has actually paid off, retired and discharged, or assumed and given her new outstanding obligations for the aggregate sum of over Seventy-one Million Dollars, as will more particularly appear from a statement thereof filed as an exhibit herewith and hereinafter referred to as Exhibit Number 7.

"It is proper in this connection to call attention to the fact that, while your Oratrix has made this large contribution toward the

settlement of the common debt, West Virginia has not paid one dollar thereof; and although in the early years of her history she repeatedly conceded that there was some portion of that debt which should equitably be borne by her, her properly constituted authorities have for a number of years refused to recognize that any liability whatever rested upon her, on that account, and have declined even to enter into an accounting or to treat with your Oratrix in reference thereto.

"It would seem from the above statement that Virginia has already done as much under all the circumstances as she could be fairly expected to do towards paying off the common public debt of the old State. Such was the view and purpose of the General Assembly in the several Acts above recited.

"A question may be raised as to whether such was the effect of the language used in the Act of March 30, 1871, with respect to the certificates issued thereunder; but the great mass of the creditors entitled to whatever may be due upon the unfunded obligations of the undivided State, have in effect agreed, as will be hereinafter shown, to waive any such question, and to accept the adjudication of this Court in this cause against West Virginia in full discharge of all their claims, thus giving that effect to the Act of March 30, 1871, which it was the purpose of your Oratrix that it should have.

"14. By each of the Acts for the settlement of her debt above recited, it was provided that the bonds of undivided Virginia so far as not funded in the new obligations given by your Oratrix, should be surrendered to and held by your Oratrix, who either by the express terms of the settlement provided for by said Acts, or as a just and equitable consequence therefrom, received and holds said original bonds so far as unfunded, in trust for the creditor who deposited the same with her, or his assigns; and certificates to this effect were given by your Oratrix to each creditor whose old Virginia bond was so surrendered to her.

"Having as an essential part of the contract for the adjustment of the common debt of the original State entered into this fiduciary relation in reference to these bonds, it became her obligation of duty to the creditors who had confided their securities to her keeping, as well as to her own people, whose credit and fair name required that these obligations of the old State should be fairly and honorably adjusted, to do all in her power to bring about a determination of West Virginia's just liability in respect thereto, and if possible the recognition and settlement of the same by that State.

"Only after exhausting every means of amicable negotiation, and having her overtures to that end repeatedly refused, and as a last resort, has your Oratrix been constrained at length reluctantly to apply to this, the only tribunal which can afford relief, for an adjudication and determination of this question, of such vast importance to your Oratrix and to all of her people.

"15. All of the bonds and obligations and other evidences of the indebtedness of the original State of Virginia outstanding and contracted on January 1, 1861, as stated in paragraph 1 of this bill,

except a comparatively insignificant sum, not amounting to one per cent of the aggregate of those liabilities, have been taken up and are now actually held by your Oratrix, and she has the right to call upon West Virginia for a settlement with respect thereto. They are too numerous and involve too great a number of transactions running through many years, for it to be practicable to exhibit them here in detail, but the original bonds and other evidences of indebtedness so paid off or retired and now held by your Oratrix, will, when it shall be proper to do so, be exhibited to the Master, who shall take the accounts hereinafter prayed for.

"16. Of the evidences of indebtedness representing principal and interest of the liabilities of Virginia contracted before her dismemberment, those so paid off or retired by your Oratrix and now held by her in her own right, exclusive of the amounts represented by the certificates issued under the funding Acts aforesaid, amount in the aggregate, including the interest to be fairly computed thereon to this date, to a very large sum, considerably in excess of \$25,000,000, by far the greater part of it being now, of course, on account of the interest computed thereon, at the rate of 6% per annum, the then legal rate in both States.

"For all of these obligations taken up and payments made on account of the common debt, your Oratrix has in her own right, a just claim against West Virginia for contribution to the extent of West Virginia's equitable liability therefor.

"17. In addition to the above bonds there were outstanding on the 1st day of January, 1861, certain obligations of the State of Virginia as guarantor upon some of the securities issued by internal improvement companies, which your Oratrix was called upon to provide for and settle. They were not comparatively of very large amount, however, and the questions involved in connection therewith can be stated and settled in the account hereafter prayed for to be taken between the two states; and in such accounts your Oratrix will also ask to have included all such items of debit against the State of West Virginia on account of the property and moneys of the original State which were received or appropriated by West Virginia which may not have been specifically or accurately stated herein. These items of accounting between the two States are so numerous and varied and extend throughout a period of so many years' duration that it is impossible from the nature of the case to state all of them in this bill; and the account between the two States can only be taken and settled, and the balance due your Oratrix thereon ascertained, under the supervision of a Court of Equity.

"18. Your Oratrix charges that the liability of the State of West Virginia, for a just and equitable proportion of the public debt of Virginia, as of the time when the State of West Virginia was created, rests upon the following among many grounds which might be indicated here:

'First. The area of the territory now known as the State of West Virginia formed about one-third of the territory of the Com-

monwealth of Virginia when this public debt was created, and its population included about one-third of that of the original State at the time of its dismemberment. And the State of West Virginia did, by the acquisition and appropriation of such territory, with the population thereof, assume therewith liability for a just and equitable proportion of the public debt created prior to the partition of such territory.

'Second. The liability of West Virginia for a just proportion of the public debt of the Commonwealth of Virginia, as it existed prior to the creation and erection of the State of West Virginia, forms part of her very political existence, and is an essential constituent of her fundamental law as shown in the said ordinance adopted at Wheeling on the 20th day of August, 1861, in which the method of ascertaining her liability on account of said debt is prescribed. And this liability is imbedded in the Constitution under which she was admitted as a State into the Federal Union, and was one of the conditions under which she was created a State and admitted into the Union.

'Third. The State of West Virginia has further, by the repeated enactments and joint resolutions of her legislature, recognized her liability for a just proportion of this debt.

'Fourth. The State of West Virginia has, since her creation as a State, received from the State of Virginia real and personal property amounting in value to many millions of dollars, and held and enjoyed the same, but upon express condition that she should duly account for the same in a settlement thereafter to be had between her and the Commonwealth of Virginia.

'Fifth. While the transfer of this property; real and personal, and also certain moneys of the Commonwealth of Virginia, purport to have been made to the State of West Virginia by the Act of 'The Restored Government of Virginia,' there were in fact represented in said 'Restored Government' and in the legislature thereof no other people and no other territory than that which then, as now, constitute the State of West Virginia.'

"19. The General Assembly of Virginia being anxious to effect a settlement of the portion of the common debt of the undivided State which remained unadjusted, and if possible to bring this about with the friendly co-operation and concurrence of West Virginia, adopted: 'A joint resolution to provide for adjusting with the State of West Virginia the proportion of the public debt of the original State of Virginia proper to be borne by the State of West Virginia, and for the application of whatever may be received from the State of West Virginia to the payment of those found to be entitled to the same,' approved March 6, 1894. A copy of this resolution will be hereinafter shown as an exhibit to this bill, to be read as a part thereof.

"Under this resolution a commission of seven members was appointed for the purpose of carrying into effect the objects expressed therein.

"The efforts made by this Commission, acting under the above

resolution to bring about a settlement with West Virginia having proved ineffectual, and the overture which the Commission, with the active co-operation of the Honorable Charles T. O'Ferral, the then governor of the Commonwealth made to the authorities of West Virginia for the purpose of bringing about a friendly adjustment having been declined, the General Assembly of Virginia passed the Act approved March 6, 1900, entitled 'An Act to provide for the settlement with West Virginia of the proportion of the public debt of the original State of Virginia proper to be borne by West Virginia, and for the protection of the Commonwealth of Virginia in the premises,' the purpose of which Act is sufficiently set forth in its title, and a copy of the act will also be hereinafter shown as one of the exhibits herewith filed.

"20. The Commission acting under said last mentioned act made most earnest efforts to bring about an amicable adjustment of the matters hereinbefore set forth with West Virginia, but all of their efforts in that behalf proved ineffectual and unavailing. An application to this Honorable Court being thus left as the only alternative for Virginia, this suit has been instituted at the request and direction of the said Commission, and in strict conformity with the provisions of the said Act of March 6, 1900, all of which will be more fully and completely shown by the Report of the said Commission dated January 6, 1906, made to the General Assembly of Virginia now in session, a copy of which Report and the documents accompanying the same, and referred to therein, will be exhibited as a part of this Bill."

21. Enumerates exhibits attached to the bill and prayed to be regarded as part thereof.

22. The bill prayed: "Forasmuch, therefore, as your Oratrix is remediless save in this form and forum, and to the end that the State of West Virginia may be duly served, through her Governor and Attorney-General, with a copy of this bill, your Oratrix prays that the said State of West Virginia may be made a party defendant to this bill, and required to answer the same, that all proper accounts may be taken to determine and ascertain the balance due from the State of West Virginia to your Oratrix, in her own right and as trustee as aforesaid; that the principles upon which such accounting shall be had may be ascertained and declared, and a true and proper settlement made of the matters and things above recited and set forth; that such accounting be had and settlement made under the supervision and direction of this Court by such Auditor or Master as may by the Court be selected and empowered to that end, and that proper and full reports of such accounting and settlement may be made to this Court; that the State of West Virginia may be required to produce before such Auditor or Master, so to be appointed, all such official entries, documents, reports and proceedings as may be among her public records or official files and may tend to show the facts and the true and actual state of accounts growing out of the matters and things above recited and set forth, in order to a full and correct settlement and adjustment of the accounts between

the two States; that this Court will adjudicate and determine the amount due your Oratrix by the State of West Virginia in the premises; and that all such other and further and general relief be granted unto your Oratrix in the premises as the nature of her case may require or to equity may seem meet."

Attached to the bill were the numerous exhibits referred to.

The State of West Virginia demurred and assigned special causes as follows:

"First. That it appears by said bill that there is a misjoinder of parties plaintiff and a misjoinder of causes of action. The said bill is brought by the Commonwealth of Virginia to recover debts alleged to be due to her in her own right from the defendant for property and money alleged to have been transferred and delivered to the defendant under certain acts of the legislature passed in 1863, and also, as trustee for the owners of certain certificates mentioned and described in said bill, to have an accounting to ascertain and declare the amount claimed to be due from the defendant as her just proportion of the public debt of the plaintiff prior to the first day of January, 1861.

"Second. That this court has no jurisdiction of either the parties to or the subject-matter of this action, because it appears by the said bill that the matters therein set forth do not constitute, within the meaning of the Constitution of the United States, such a controversy, or such controversies, between the Commonwealth of Virginia and the State of West Virginia as can be heard and determined in this court, and this court has no power to render or enforce any final judgment or decree thereon.

"Third. That it appears by said bill that the plaintiff herein sues as trustee for the benefit of a number of individuals who are the alleged owners of certain certificates in the said bill set forth and described.

"Fourth. That the said bill does not state facts sufficient to entitle the Commonwealth of Virginia to the relief prayed for, or to any relief, either in her own right or as trustee for the owners of the certificates therein set forth and described.

"Fifth. That it does not appear by said bill that the Attorney General has ever been authorized to institute and prosecute this suit in the name of the Commonwealth of Virginia in her own right, but only as trustee for the use and benefit of the owners of certain certificates mentioned in the act of March 6, 1900, which is referred to and made part of said bill.

"Sixth. That the said bill does not sufficiently and definitely set forth the claims and demands relied upon, but the allegations thereof are so indefinite and uncertain that no proper answer can be made thereto.

"Seventh. That the allegations in the said bill are not sufficient

to entitle the plaintiff therein, either in her own right or as trustee, to an account or to a discovery from this defendant.

"Eighth. That the said bill does not contain any prayer for a judgment or decree or any other final relief against this defendant."

Hearing on the demurrer was had March 11, 12, 1907.

Mr. Chief Justice FULLER delivered the opinion of the Court:

The State of West Virginia was admitted into the Union June 20, 1863, under the proclamation of the President of the United States of April 20, 1863, in pursuance of the act of Congress approved December 31, 1862, upon the terms and conditions prescribed by the Commonwealth of Virginia in ordinances adopted in convention and in acts passed by the General Assembly of the Restored Government of the Commonwealth, giving her consent to the formation of a new State out of her territory, with a constitution adopted for the new State by the people thereof. The ninth section of the ordinance adopted by the people of the Restored State of Virginia in convention assembled in the city of Wheeling, Virginia, on August 20, 1861, entitled "An ordinance to provide for the formation of a new State out of a portion of the territory of this State," provided as follows:

"9. The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, 1861, to be ascertained by charging to it all State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government, since any part of said debt was contracted; and deducting therefrom the monies paid into the treasury of the Commonwealth from the counties included within the said new State during the same period. All private rights and interests in lands within the proposed State, derived from the laws of Virginia prior to such separation, shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in the State of Virginia. . . ."

The consent of the Commonwealth of Virginia was given to the formation of a new State on this condition. February 3 and 4, 1863, the General Assembly of the Restored State of Virginia enacted two statutes in pursuance of the provisions of which money and property amounting to and of the value of several millions of dollars were, after the admission of the new State, paid over and transferred to West Virginia. The Constitution of the State of West Virginia when admitted contained these provisions, being sections 5, 7 and 8 of Article VIII thereof, as follows:

"5. No debt shall be contracted by this State, except to meet casual deficits in the revenue, to redeem a previous liability of the State, to suppress insurrection, repel invasion, or defend the State in time of war."

"7. The legislature may at any time direct a sale of the stocks owned by the State in banks and other corporations, but the proceeds of such sale shall be applied to the liquidation of the public debt and hereafter the State shall not become a stockholder in any bank."

"8. An equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, in the year one thousand eight hundred and sixty-one, shall be assumed by this State; and the legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof, by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years."

The "public debt" and the "previous liability" manifestly referred to a portion of the original debt of the original State of Virginia and liability for the money and property of the original State, which had been received by West Virginia under the acts of the General Assembly above cited, enacted while the territory and people afterwards forming the State of West Virginia constituted a part of the Commonwealth of Virginia, though one may be involved in the other; while the provisions of sections 7 and 8 were obviously framed in compliance with the conditions on which the consent of Virginia was given to the creation of the State of West Virginia, and the money and property were transferred. From 1865 to 1905 various efforts were made by Virginia through its constituted authorities to effect an adjustment and settlement with West Virginia for an equitable proportion of the public debt of the undivided State, proper to be borne and paid by West Virginia, but all these efforts proved unavailing, and it is charged that West Virginia refused or failed to take any action or do anything for the purpose of bringing about a settlement or adjustment with Virginia.

The original jurisdiction of this court was, therefore, invoked by Virginia to procure a decree for an accounting as between the two States, and, in order to a full and correct adjustment of the accounts, the adjudication and determination of the amount due Virginia by West Virginia in the premises.

But it is objected that this court has no jurisdiction because the matters set forth in the bill do not constitute such a controversy or such controversies as can be heard and determined in this court, and because the court has no power to enforce and therefore none to

render any final judgment or decree herein. We think these objections are disposed of by many decisions of this court. *Cohens v. Virginia*, 6 Wheat. 264, 378, 406; *Kansas v. Colorado*, 185 U. S. 125; *Kansas v. Colorado*, May 13, 1907, 206 U. S. p. ; *Missouri v. Illinois*, 180 U. S. 208; *Same case*, 200 U. S. 496; *Georgia v. Copper Company*, May 13, 1907, 206 U. S. p. ; *United States v. Texas*, 143 U. S. 621; *United States v. North Carolina*, 136 U. S. 211; *United States v. Michigan*, 190 U. S. 379.

In *Cohens v. Virginia*, the Chief Justice said: "In the second class, the jurisdiction depends entirely on the character of the parties. In this are comprehended 'controversies between two or more States, between a State and the citizens of another State,' 'and between a State and foreign States, citizens or subjects.' If these be the parties, it is entirely unimportant what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union."

And, referring to the Eleventh Amendment, it was further said:

"It is a part of our history, that, at the adoption of the Constitution, all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the Federal courts formed a very serious objection to that instrument. Suits were instituted; and the court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress, and adopted by the State legislatures. That its motive was not to maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of amendment. It does not comprehend controversies between two or more States, or between a State and a foreign State. The jurisdiction of the court still extends to these cases and in these a State may still be sued. We must ascribe the amendment, then, to some other cause than the dignity of a State. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a State, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors. There was not much reason to fear that foreign or sister States would be creditors to any considerable amount, and there was no reason to retain the jurisdiction of the court in those cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by States."

By the cases cited, and there are many more, it is established that, in the exercise of original jurisdiction as between States, this court necessarily in such a case as this has jurisdiction.

United States v. North Carolina and *United States v. Michigan*, *supra*, were controversies arising upon pecuniary demands, and jurisdiction was exercised in those cases just as in those for the prevention of the flow of polluted water from one State along the borders of another State, or of the diminution in the natural flow of rivers by the State in which they have their sources through and across another State or States, or of the discharge of noxious gases from works in one State over the territory of another.

The object of the suit is a settlement with West Virginia, and to that end a determination and adjudication of the amount due by that State to Virginia, and when this court has ascertained and adjudged the proportion of the debt of the original State which it would be equitable for West Virginia to pay, it is not to be presumed on demurrer that West Virginia would refuse to carry out the decree of this court. If such repudiation should be absolutely asserted we can then consider by what means the decree may be enforced. Consent to be sued was given when West Virginia was admitted into the Union, and it must be assumed that the Legislature of West Virginia would in the natural course make provision for the satisfaction of any decree that may be rendered.

It is, however, further insisted that this court cannot proceed to judgment because of an alleged compact entered into between Virginia and West Virginia, with the consent of Congress, by which the question of the liability of Virginia to West Virginia was submitted to the arbitrament and award of the Legislature of West Virginia as the sole tribunal which could pass upon it. As we have seen, the Constitution of West Virginia when admitted into the Union contained the provision: "An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, one thousand eight hundred and sixty-one, shall be assumed by the State, and the Legislature shall ascertain the same as soon as may be practicable and provide for the liquidation of the same by a sinking fund and redeem the principal within thirty-four years." And it is said that, on May 13, 1862, the Legislature of Virginia passed an act entitled "An act giving the consent of the Legislature of Virginia to the formation and erection of a new State within the jurisdiction of this State," by which consent was given to the creation of the proposed new State, "according to the boundaries and under the provisions set forth in the Constitution for the said State of West Virginia, and the schedule thereto annexed, proposed by the convention which assembled at Wheeling

on the twenty-sixth day of November, 1861;" and that by the act of Congress the consent of that body was given to all those provisions which thus became a constitutional and legal compact between the two States. The act of May 13, 1862, was not made a part of the case stated in the bill, and its validity is denied by counsel for Virginia, but it is unnecessary to go into that, for when Virginia, on August 20, 1861, by ordinance provided "for the formation of a new State out of the territory of this State," and declared therein that "the new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861," to be ascertained as provided, it is to be supposed that the new State had this in mind when it framed its own constitution, and that when that instrument provided that its Legislature should "ascertain the same as soon as practicable," it referred to the method of ascertainment prescribed by the Virginia convention. Reading the Virginia ordinance and the West Virginia constitutional provision *in pari materia*, it follows that what was meant by the expression that the "Legislature shall ascertain" was that the Legislature should ascertain as soon as practicable the result of the pursuit of the method prescribed, and provide for the liquidation of the amount so ascertained. And it may well be inquired why, in the forty-three years that have elapsed since the alleged compact was entered into, West Virginia has never indicated that she stood upon such a compact, and, if so, why no step has ever been taken by West Virginia to enter upon the performance of the duty which such "compact" imposed, and to notify Virginia that she was ready and willing to discharge such duty.

It is also urged that Virginia had no interest in the subject-matter of the controversy because she had been released from all liability on account of the public debt of the old Commonwealth, evidenced by her bonds outstanding on the first day of January, 1861. This relates to the acts of the General Assembly of Virginia of March 30, 1871, March 28, 1879, February 14, 1882, February 20, 1892, March 6, 1894, and March 6, 1900. According to the bill, Virginia by the act of March 30, 1871, and subsequent acts, in an attempt to provide for the funding and payment of the public debt, having estimated that the liability of West Virginia was for one-third of the amount of the old bonds, provided for the issue of new bonds to the amount of two-thirds of the total, and for the issue of certificates for the other third, which showed that Virginia held the old bonds so far as unfunded in trust for the holders or their

assignees to be paid by the funds expected to be obtained from West Virginia as her "just and equitable proportion of the public debt." The legislation resulted in the surrender of most of the old bonds to Virginia, satisfied as to two-thirds, and held as security for the creditors as to one-third. We do not care to take up and discuss this legislation. We are satisfied that as we have jurisdiction, these questions ought not to be passed upon on demurrer. *Kansas v. Colorado*, 185 U. S. 125, 144, 145. And this also furnishes sufficient ground for not considering at length the objection of multifariousness. The observations of Lord Cottenham, in *Campbell v. Mackey*, 1 Mylne & Craig, 603, that it is impracticable to lay down any rule as to what constitutes multifariousness, as an abstract proposition; that each case must depend upon its own circumstances; and much must be left where the authorities leave it, to the sound discretion of the court, have been often affirmed in this court. *Oliver v. Piatt*, 3 How. 333, 411; *Gaines v. Relf*, 2 How. 619, 642. But we do not mean to rule that the bill is multifarious. It is true that the prayer contains, among other things, the request, "that all proper accounts may be taken to determine and ascertain the balance due from the State of West Virginia to your Oratrix in her own right and as trustee aforesaid," but it also prays that the court "will adjudicate and determine the amount due to your Oratrix by the State of West Virginia in the premises." And we understand the reference to holding in trust to be in the interest of mere convenience, and that the bill cannot properly be regarded as seeking in chief anything more than a decree for "an equitable proportion of the public debt of the Commonwealth of Virginia on the first day of January, 1861." The objections of misjoinder of parties and misjoinder of causes of action may be treated as resting on matter of surplusage merely, and at all events further consideration thereof may wisely be postponed to final hearing. *Florida v. Georgia*, 17 How. 491, 492; *California v. Southern Pacific Company*, 157 U. S. 249.

The order will be—

Demurrer overruled without prejudice to any question, and leave to answer by the first Monday of next term.